and 180-pound weights listed for respondent's brother. App., *infra*, 3a; C.A. E.R. 85.

One factor—beyond the matching Social Security number and birth date—pointed decisively toward the conclusion that respondent and not his brother was the person sought by Florida authorities. The FBI description of respondent's brother indicated that he had multiple identifying marks, including scars on his neck and thigh and a tattoo on his left forearm. C.A. E.R. 85. The Florida warrant's "scars or tattoos" line did not list any identifying marks. *Id.* at 83.

When Agent Gregory contacted Florida authorities about the warrant, they told him the warrant was current and that they were interested in extraditing "Christopher Lee." C.A. E.R. 260. Agent Gregory gave a copy of the warrant to San Diego authorities and told them that he believed he had located Christopher Lee. App., *infra*, 4a. Gregory then sent a memorandum to the FBI's Philadelphia Office explaining that, after respondent had "indicated he would not submit to an interview * * * and hung up," further "investigation disclosed an outstanding local arrest warrant for Christopher Lee * * * in Dade County, FL." C.A. E.R. 75. "In view of [respondent's] hang-up phone call *and status as a fugitive himself*," Agent Gregory continued, respondent "appears unlikely to provide any information regarding his brother, Robert Lee." C.A. E.R. 76 (emphasis added). Agent Gregory stated that he would not conduct "any further investigation." *Ibid.* Agent Gregory added that, if San Diego authorities were to apprehend respondent, he would "attempt to interview" respondent and apprise the FBI's Philadelphia Office "of the results." *Ibid.*

On May 4, 2000, San Diego authorities arrested respondent. App., *infra*, 5a. Agent Gregory visited respondent in jail and told him that, if he provided information on his brother's whereabouts, Agent Gregory would advise Florida authorities of his cooperation. *Ibid.* Respondent offered no

information about his brother and, according to respondent, protested his innocence. Believing that respondent was about to be extradited to Florida, Agent Gregory told respondent to "have a nice trip to Florida." *Ibid.*

On May 8, 2000, respondent posted bail. About two weeks later, respondent's attorney called Agent Gregory claiming that this was a case of mistaken identity. Gregory contacted Florida authorities and sent them information about and photographs of respondent's brother, Robert Q. Lee. App., *infra*, 5a. Florida authorities compared those photographs to their mug shots and decided that Robert Lee, rather than respondent, had committed the assault and burglary in Florida. When Agent Gregory relayed that information to the San Diego District Attorney's office, all charges against respondent were dropped. *Ibid.*

2. In April 2001, respondent filed this damages action against Special Agent Gregory under *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671, *et seq.* The complaint alleged, among other things, that Agent Gregory had caused respondent to be arrested even though Gregory "knew [respondent] to be innocent." C.A. E.R. 9 (First Amended Complaint).

Agent Gregory moved for summary judgment, asserting qualified immunity. Citing *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001), the district court analyzed qualified immunity in two steps. First, the court asked whether the facts, viewed in the light most favorable to respondent, established the violation of a constitutional right. Second, the court asked whether, assuming a constitutional violation, Agent Gregory should be entitled to qualified immunity because, at the time he acted, the law did not "clearly establish[]" that his "conduct was unlawful in the circumstances of the case." App., *infra*, 18a (quoting *Saucier*, 533 U.S. at 201).

Addressing the first question, the district court rejected Agent Gregory's contention that the arrest was constitutional because there was a facially valid warrant for respondent's arrest. App., *infra*, 19a-20a. The district court likewise rejected Agent Gregory's contention that, at the very least, he had probable cause to believe that respondent was the person named in the warrant. *Id.* at 20a-21a. The district court did not deny that "the warrant matched [respondent's] name, gender, race, date of birth and Social Security number." *Id.* at 19a-20a. And it did not address whether a reasonably prudent person confronted with the warrant, as well as the other evidence, could reasonably conclude that the warrant sought respondent's arrest. Instead, the court held that a trial was necessary to resolve respondent's claim "that Agent Gregory [had] procured [respondent's] arrest *knowing* that he was not the man named in the Florida warrant in order to gather information on [respondent's] brother." *Id.* at 21a (emphasis added). "Whether Agent Gregory knew [respondent] was the person in the Florida warrant is an issue for the finder of fact, making summary judgment inappropriate." *Ibid.*

The district court also rejected Agent Gregory's claim of qualified immunity. App., *infra*, 21a-22a. The court acknowledged Gregory's argument "that under an objective view of the facts"—including the match between the warrant and respondent with respect to name, birth date, Social Security number, race, gender, and the similarity in heights, along with any disparities in the descriptions—"a reasonable officer could have concluded that the arrest warrant applied to [respondent]." *Id.* at 22a. But the court denied qualified immunity because "Agent Gregory has not addressed the law relating to knowingly arresting the wrong person." *Ibid.* The court concluded:

> In essence, Agent Gregory argues that he reasonably, although mistakenly, believed that the person named in [the] Florida arrest warrant was [respondent].

> [Respondent] argues that [Agent Gregory] knew the person named in the warrant was not [respondent] but that Agent Gregory procured [respondent's] arrest for the purpose of pressuring [him] to provide information on his brother. This is a factual dispute that is to be determined by a finder of fact, and not appropriate for summary judgment.

App., *infra*, 22a-23a.

3. Agent Gregory appealed, and the Ninth Circuit affirmed. App., *infra*, 1a-11a. Like the district court, the Ninth Circuit first addressed whether respondent had shown a constitutional violation. In answering that question, the Ninth Circuit did not identify any dispute about the evidence before Agent Gregory—*i.e.*, what Agent Gregory observed, saw, and heard. Nor did the Ninth Circuit inquire whether Agent Gregory's conduct was reasonable because he had a warrant that commanded respondent's arrest and set forth respondent's name, Social Security number, birth date, race, gender, absence of identifying marks, and approximate height. And the Ninth Circuit did not address whether the *totality of the information* available to Agent Gregory—including the matching information in the warrant as well as the other data—established probable cause to arrest.

Instead, the Ninth Circuit joined the district court in holding that summary judgment was inappropriate because respondent alleged that "Gregory actually *knew* the Florida warrant applied not to [respondent Julian Lee], but to Robert." App., *infra*, 7a (emphasis added). "Knowingly arresting the wrong man pursuant to a facially valid warrant issued for someone else violates rights guaranteed by the Fourth Amendment." *Id.* at 8a. "Gregory's contention that his actual knowledge should be ignored," the court of appeals added, "is completely without merit." *Ibid.*

The Ninth Circuit noted respondent's allegation that Gregory had arrested respondent "to pressure him for

information about Robert," but agreed that "allegations of ulterior *motives* cannot invalidate police conduct that is justified by probable cause." App., *infra*, 7a. Nonetheless, the Ninth Circuit distinguished intent and motive from knowledge, stating that Agent Gregory's conduct was not "impugned because of his motive, but because of his claimed *knowledge* that [respondent] was not the person named in the Florida arrest warrant." *Ibid.* Thus, despite the absence of any dispute over the information before Gregory, the Ninth Circuit remanded for a trial on whether Agent Gregory had concluded—and thus "knew"—that respondent was innocent when he caused respondent's arrest.[1]

The Ninth Circuit then turned to Agent Gregory's claim that he did not violate respondent's "clearly established" rights and is therefore entitled to qualified immunity. App., *infra*, 8a-10a. Once again, the court did not identify any disputes over the objective information available to Agent Gregory. Once again, it did not ask whether "a reasonable officer" confronted with that information *could have believed* that there was, as an objective matter, sufficient cause to arrest respondent as the person named in the warrant. See *Saucier*, 533 U.S. at 202. Instead, the Ninth Circuit asked whether a reasonable officer could have believed "that he is entitled *knowingly* to arrest the wrong man pursuant to a facially valid warrant." *Id.* at 9a (emphasis added). Answering that question in the negative, the Ninth Circuit held that "[k]nowingly arresting the wrong person" is self-evidently unlawful "because an officer cannot have probable cause to believe the person arrested has committed the crime described in the warrant when he

---

[1] In the court of appeals, respondent relied on photographs of respondent and his brother. It is undisputed, however, that the Florida warrant did not include a photograph, and Agent Gregory did not see respondent or a picture of respondent until after his arrest. C.A. E.R. 79; Gov't C.A. Reply Br. 22-23. The Ninth Circuit, in any event, placed no reliance on the photographs.

knows that the warrant identifies another person." *Ibid.* The Ninth Circuit stated that it could not "determine whether Gregory knew or did not know he was causing the arrest of the wrong man." *Id.* at 10a. "That is an issue reserved to the trier of fact at trial." *Ibid.*

Agent Gregory filed a petition for rehearing. The Ninth Circuit ordered a response on August 24, 2004, and denied the petition on April 15, 2005.

REASONS FOR GRANTING THE PETITION

This Court has long held that, because Fourth Amendment reasonableness and qualified immunity are *objective* tests, they must be resolved in light of the information before the officer, without regard to the officer's subjective conclusions or motivations. In this case, the Ninth Circuit found no disputes regarding the evidence before Special Agent Gregory (what Gregory saw, read, and heard). There thus was no dispute that, at the time Agent Gregory acted, he had before him a Florida arrest warrant issued under the name respondent was using, with respondent's Social Security number, date of birth, race, gender, and approximate height, together with other information, such as a weight disparity and data concerning respondent's brother's aliases. The Ninth Circuit, however, refused to address whether that information was, as an objective matter, sufficient to justify arrest. It likewise refused to address whether, for qualified immunity purposes, a reasonably competent officer could have thought that information sufficient to justify arrest. Instead, the Ninth Circuit held that a dispute over the officer's *subjective assessment* of the information before him precluded qualified immunity. In particular, the Ninth Circuit held that qualified immunity was unavailable because respondent alleged that Agent Gregory "knew"—*i.e.*, that Agent Gregory had concluded from the information before him—that respondent was innocent.

That holding squarely conflicts with decisions of the First Circuit. Time and again, the First Circuit has held that the arresting officer's "subjective" assessments of the facts—*e.g.*, conclusions drawn in his own mind pertaining to guilt or innocence—are irrelevant to Fourth Amendment and qualified immunity inquiries. Instead, the only issue is the information before the officer—what he saw, heard, read, and was told. If that information, *objectively assessed*, was sufficient to justify arrest or a competent officer could have thought it sufficient, the arresting officer is entitled to immunity.

The Ninth Circuit's contrary approach conflates knowledge with subjective belief and reintroduces precisely the inquiry into subjective mental processes that this Court excised from the Fourth Amendment and qualified immunity inquiries long ago. The Ninth Circuit's decision also punches a gaping hole in the qualified immunity defense. If officers are judged based what they "actually knew" in the sense of what they *subjectively concluded* from the evidence, virtually every *Bivens* and Section 1983 case will have to be resolved by a jury, eviscerating qualified immunity as "an entitlement not to stand trial or face the other burdens of litigation." *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985). In almost any mistaken arrest case, the plaintiff will be able to point to some allegedly exculpatory information and urge that the officer "knew" he was innocent.

The question here—whether Fourth Amendment reasonableness or qualified immunity permits "inquiry into" the thoughts in "the officer's mind," Resp. C.A. Br. 16—is important and recurring. Officers confront the risk of seizing the "wrong" person virtually every time they execute a warrant, a risk that has been heightened in recent years by dramatic increases in identity theft (like that perpetrated by respondent's brother). Yet, under the decision below and others like it, plaintiffs may now avoid qualified immunity and force the officer to endure a trial in

virtually every mistaken arrest case, no matter how objectively reasonable the officer's conduct may be in light of the evidence before him, merely by pointing to a supposedly exculpatory fact and alleging that the officer effected the seizure "knowing"—*i.e.*, after subjectively concluding—that the suspect was innocent. "If an officer executing an arrest warrant must do so at peril of" litigation "if there is any discrepancy [in] the description [in] the warrant * * *, many a criminal will slip away." *Johnson* v. *Miller*, 680 F.2d 39, 41 (7th Cir. 1982). That is precisely the effect the Ninth Circuit's decision will have.

I. The Ninth Circuit's Decision Conflicts With This Court's Decisions Holding That Fourth Amendment And Qualified Immunity Inquiries Are Objective

A. The Ninth Circuit's Decision Improperly Introduces Subjective Inquiries Into The Fourth Amendment

Because the "touchstone of the Fourth Amendment is reasonableness" rather than perfection, *Florida* v. *Jimeno*, 500 U.S. 248, 250 (1991), the "Constitution does not guarantee that only the guilty will be arrested," *Baker* v. *McCollan*, 443 U.S. 137, 145 (1979); see *Graham* v. *Connor*, 490 U.S. 386, 396 (1989); *Hill* v. *California*, 401 U.S. 797 (1971). Instead, an arrest is lawful if there is probable cause—if, at the time of arrest, "the facts and circumstances within [the officer's] knowledge" were "sufficient to warrant a prudent man in believing" that a crime had been committed. *Saucier* v. *Katz*, 533 U.S. 194, 207 (2001) (quoting *Beck* v. *Ohio*, 379 U.S. 89, 91 (1964)); *Hunter* v. *Bryant*, 502 U.S. 224, 228 (1991). Likewise, officers "executing an arrest warrant" need not "investigate independently every claim of innocence, whether the claim is based on mistaken identity or a defense such as lack of requisite intent." *McCollan*, 443 U.S. at 145-146.

In deciding whether there is probable cause, courts must first look to the information available to the arresting officers. *Ornelas* v. *United States*, 517 U.S. 690, 696 (1996). The question is "whether these *historical facts*, viewed from the standpoint of an *objectively reasonable* police officer, amount to * * * probable cause." *Ibid.* (emphasis added). Reasonableness is thus "measured in objective terms by examining the totality of the circumstances," *Ohio* v. *Robinette*, 519 U.S. 33, 39 (1996), and an officer's subjective intent or motivation cannot "invalidate[] objectively justifiable behavior under the Fourth Amendment," *Whren* v. *United States*, 517 U.S. 806, 812 (1996).

Just last Term, this Court reemphasized the objective nature of the Fourth Amendment inquiry:

> As we have repeatedly explained, "the fact that the officer does not have the *state of mind* which is hypothecated by the reasons which provide the legal justification for the officer's actions does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." *Whren*, *supra*, at 813 * * * . "The Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever the subjective intent.*" *Whren*, *supra*, at 814. "[E]venhanded law enforcement is best achieved by the application of *objective* standards of conduct, rather than standards that depend upon *the subjective state of mind* of the officer." *Horton* v. *California*, 496 U.S. 128, 138 (1990).

Devenpeck v. *Alford*, 125 S. Ct. 588, 594 (2005) (emphasis added).

The Ninth Circuit's decision in this case cannot be reconciled with that standard. The Ninth Circuit did not identify disputes about the evidence before Agent Gregory—what Gregory observed, heard, and saw. Nor did the Ninth Circuit evaluate whether the observable information estab-

lished probable cause or otherwise justified respondent's arrest under the Florida warrant. The Ninth Circuit thus failed to ask whether, as an objective matter, it is reasonable to arrest in reliance on a warrant that (1) is issued under a name used by the arrestee; (2) includes the arrestee's Social Security number, birth date, race, gender, and approximate height (within 2 inches); and (3) omits scars, tattoos, or other identifying marks that characterize the other possible culprit (here, respondent's brother). Nor did the Ninth Circuit evaluate whether other information, such as the disparity in weights or indications that respondent's brother might have appropriated respondent's identity in other contexts, rendered reliance on the Florida warrant unreasonable.

Instead, the Ninth Circuit held that respondent had alleged a Fourth Amendment violation by asserting that Agent Gregory "actually knew"—*i.e.*, that Gregory subjectively concluded from the undisputed facts before him—"that the Florida warrant applied not to [respondent], but to [respondent's brother] Robert." App., *infra*, 8a. But the Ninth Circuit did not suggest that Gregory somehow witnessed the Florida crimes, giving him personal knowledge of who committed them. Rather, the Ninth Circuit found a material issue of fact over what Agent Gregory *concluded* from the evidence before him—requiring a trial to determine whether Gregory in fact "believed that the person named in [the] Florida arrest warrant was [respondent]" or whether he instead "knew the person named in the warrant was not [respondent]." *Id.* at 22a. That, however, "is not knowledge, but subjective belief." *Brady* v. *Dill*, 187 F.3d 104, 113 (1st Cir. 1999).

Under this Court's cases, Fourth Amendment reasonableness turns not on the subjective question of what the officer *thought* or *concluded*, but rather on the *objective* question of what the officer *observed*. If the historical facts available to Agent Gregory were sufficient to support a

reasonably prudent person in concluding that respondent had committed a crime or otherwise was the person named in the Florida warrant, the arrest was lawful. An arrest cannot be rendered unconstitutional by the "fact that the officer *does not have the state of mind*," *i.e.*, the subjective belief, "which is hypothecated by the [objective] reasons which provide the legal justification for the officer's action * * * , as long as the circumstances, *viewed objectively*, justify that action." *Whren*, 517 U.S. at 813 (emphasis added). "Subjective concepts * * * have no proper place in that inquiry." *Graham*, 490 U.S. at 399.

Indeed, even where officers actually "testif[y] * * * that there was no probable cause," that subjective belief does not preclude the evidence from being sufficient to establish probable cause. *Florida* v. *Royer*, 460 U.S. 491, 507 (1983) (plurality). *A fortiori*, an arrestee's claim that the officer somehow believed that he was innocent cannot preclude the evidence from being sufficient to establish probable cause for arrest.

B. The Decision Below Erroneously Reintroduces Into Qualified Immunity The Subjective Inquiry This Court Excised In *Harlow*

In *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982), this Court held that qualified immunity protects government officials from suit unless they violate "clearly established statutory or constitutional rights of which a reasonable person would have known." Conduct violates "clearly established rights" only if the violation is so obvious that no reasonable officer could have thought the conduct lawful under the circumstances before him. Thus, even if an officer violates the Constitution, immunity shields the officer from suit and liability unless, "*on an objective basis*, it is obvious that *no reasonably competent officer* would have concluded" that his actions were constitutional at the time they were undertaken. *Malley* v. *Briggs*, 475 U.S. 335, 341

(1986) (emphasis added). "[I]f officers of reasonable competence could disagree on" the conduct's lawfulness, "immunity should be recognized." *Id.* at 341.

Qualified immunity reflects a careful balance between constitutional rights and the need for effective law enforcement. *Scheuer* v. *Rhodes*, 416 U.S. 232, 241 (1974). "Implicit in the idea that officials have some immunity * * * is a recognition that they may err. The concept of immunity assumes * * * that it is better to risk some error and possible injury" than for officers "not to * * * act at all." *Id.* at 242. Qualified immunity ensures that the threat of litigation does not divert public officials from "pressing public issues," deter "able citizens from acceptance of public office," or "dampen the ardor" with which officers discharge important law enforcement duties. *Harlow*, 457 U.S. at 814.

Before this Court decided *Harlow*, the test for qualified immunity required *subjective* good faith. *Harlow*, 457 U.S. at 814. *Harlow*, however, "rejected the inquiry into state of mind in favor of a wholly objective standard." *Davis* v. *Scherer*, 468 U.S. 183, 191 (1984); *Anderson* v. *Creighton*, 483 U.S. 635, 645 (1987) (*Harlow* "completely reformulated qualified immunity * * *, replacing the inquiry into subjective malice [with] an objective inquiry into the legal reasonableness of the official action."). The Court explained that, for qualified immunity to be effective, it must protect officers not merely from damages but also from discovery and the other burdens of litigation that can be "peculiarly disruptive [to] effective government" and a deterrent to decisive action. *Harlow*, 457 U.S. at 817. Qualified immunity therefore must be capable of early resolution, generally before trial. *Id.* at 815-816. Because subjective "thought processes" only "rarely can be decided by summary judgment," the Court in *Harlow* held that it was necessary to "defin[e] the limits of qualified immunity essentially in objective terms." *Id.* at 816, 819. This Court has repeatedly reaffirmed that qualified immunity must be decided "on an

objective basis" whenever possible. *Malley*, 475 U.S. at 341; *Anderson*, 483 U.S. at 641; *Saucier*, 533 U.S. at 202.

Consequently, the question here is not the subjective question whether *Agent Gregory believed* respondent was guilty or innocent. Instead, the "question is the objective inquiry whether *a reasonable officer could have believed*" that the arrest "was lawful in light of clearly established law and *the information* the officers possessed." *Wilson* v. *Layne*, 526 U.S. 603, 615 (1999) (emphasis added). The Ninth Circuit, however, never made that inquiry. It did not ask whether a reasonable officer could have believed the arrest lawful in light of "the information" that Agent Gregory "possessed." It thus did not inquire whether a reasonable officer standing in Gregory's shoes—holding a Florida arrest warrant issued under the name respondent was using, with respondent's Social Security number, date of birth, gender, race, and approximate height, and no indication of identifying marks—could have thought the arrest lawful despite the weight differential and information about respondent's brother. Instead, the Ninth Circuit denied qualified immunity because respondent alleged that Gregory, based on that information, had concluded and thus "knew" that respondent's brother, rather than respondent, committed the crimes in Florida. App., *infra*, 7a. "[K]nowingly causing the arrest of the wrong person," the Ninth Circuit stated, "is plainly unlawful." *Id.* at 9a.

That conception of "knowledge" as encompassing the subjective conclusions the officer allegedly drew in his own head, as opposed to the observable facts and information before him, radically alters the objective, reasonable-officer test mandated by this Court's cases. It reintroduces the subjective inquiry this Court eliminated in *Harlow*, replacing the objective inquiry into what an officer *observed* with an unworkable effort to probe the officer's mind to determine what he believed or concluded. That contravenes this Court's admonition that the defendant's own "subjec-

tive beliefs" are "irrelevant." *Anderson*, 483 U.S. at 641. It likewise contravenes this Court's observation that, although qualified immunity requires an inquiry into "the *information* possessed by" the officer, that inquiry does not "reintroduce into qualified immunity analysis the inquiry into officials' subjective intent that *Harlow* sought to minimize." 483 U.S. at 641 (emphasis added). Rather, the "relevant question" is "the *objective* (albeit fact-specific) question whether *a reasonable officer could have believed*" the conduct "to be lawful, in light of clearly established law and the *information* [the defendant] possessed"—not whether the particular defendant could have thought it lawful in light of the subjective conclusions he allegedly drew, in his own mind, from the information before him. *Ibid.* (emphasis added).

The Ninth Circuit attempted to distinguish this Court's cases as merely proscribing inquiries into "ulterior motives." App., *infra*, 7a. Here, the Ninth Circuit urged, "Gregory's actions are impugned not because of his motive, but because of his claimed *knowledge* that respondent was not the person named in the Florida arrest warrant." *Ibid.* That purported distinction makes no sense. The Ninth Circuit did not identify any dispute about the information and historical facts available to Agent Gregory—what Gregory observed, saw, or heard—and thus about the facts that Agent Gregory "knew." The only dispute is whether Agent Gregory, based on those facts, *concluded* that respondent's brother rather than respondent was the one who had committed the offenses in Florida. It is precisely such probing into the officer's mental processes—not into his "knowledge, but [into his] subjective belief," *Brady*, 187 F.3d at 113—that this Court's cases proscribe.

Indeed, under the Ninth Circuit's approach, lawsuits challenging otherwise identical arrests, based on the same information, would be resolved differently if the jurors concluded that, in one, a more intelligent officer realized (and

thus "knew") he was arresting the wrong person while, in the other, they concluded that a less intelligent officer did not. There is no basis for making an officer's liability turn on what jurors believe he was thinking rather than on the information before him when he acted. To the contrary, that creates precisely the problem—the need for every case to go to trial to determine the officer's subjective beliefs—that *Harlow's* move to an objective standard was meant to avoid.[2]

II. The Courts Of Appeals Are Divided On The Relevance Of An Officer's Subjective Conclusions

The decision below exacerbates conflict over whether an officer's subjective assessments of the information before him—what the officer allegedly *concluded* from objective observations—can be considered "knowledge" for purposes of Fourth Amendment and qualified immunity determinations. The First Circuit has repeatedly held that a plaintiff

---

[2] The Ninth Circuit also erred in holding that qualified immunity was unavailable simply because it could articulate a clear legal rule in the abstract—that officers cannot "knowingly arrest the wrong person pursuant to a facially valid warrant for someone else." In *Anderson*, this Court held that qualified immunity may not be denied merely because "the relevant 'legal rule'" was "clearly established" at a high level of generality. *Anderson*, 483 U.S. at 639. Immunity may be denied only if "the right" was "'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that *what he is doing* violates that right." *Id.* at 640 (emphasis added); *Saucier*, 533 U.S. at 202 (inquiry to be conducted at a "particularized" level "in light of the specific context of the case"); *Brosseau* v. *Haugen*, 125 S. Ct. 596, 599 (2004) (*per curiam*) ("inquiry must be undertaken in light of the specific context of the case, not as a broad proposition") (quotation marks omitted). Thus, the critical inquiry here is whether, "in light of * * * the *information*" Gregory "possessed," a "reasonable officer could have believed [the arrest] to be lawful," *Anderson*, 483 U.S. at 641 (emphasis added)—not whether an officer could, in the abstract, believe it lawful "knowingly" to arrest the wrong person.

cannot defeat qualified immunity by alleging that the arresting officer *knew* he was innocent, so long as another reasonable officer might have thought the objective information before him was sufficient to justify arrest. The Ninth Circuit reached the opposite result, creating a clear conflict and deepening the confusion in the federal courts.

A. The Ninth Circuit's Decision Squarely Conflicts With Decisions Of The First Circuit

1. The First Circuit has twice rejected precisely the argument accepted by the Ninth Circuit here—first in *Floyd* v. *Farrell*, 765 F.2d 1 (1985), and then in *Brady* v. *Dill*, 187 F.3d 104 (1999).

In *Floyd*, the officer arrested the plaintiff, Barry Floyd, after he was stopped while driving a stolen car. 765 F.2d at 3. Floyd alleged that the arrest was wrongful because his "comments * * * at the time of his arrest made it clear that he did not know the car was stolen." *Id.* at 4, 6. Apparently, the officer made statements supporting that claim, admitting that he was "only holding Floyd to 'flush out' Floyd's father," who was a fugitive. *Id.* at 6; compare App., *infra*, 20a (denying qualified immunity because of respondent's assertion that "Agent Gregory knew the warrant pertained to [respondent's] brother and procured the arrest to obtain information on [respondent's] brother.").

The First Circuit held that such assertions could not defeat qualified immunity if the evidence before the officer, objectively assessed, was arguably sufficient to establish probable cause. Qualified immunity, the First Circuit explained, does not permit an inquiry into the officer's "subjective state of mind" to determine whether the officer's "own evaluation of the facts before him" had led him to "believe that Floyd did not know the car was stolen." *Floyd*, 765 F.2d at 8. The First Circuit explained:

> The subjective state of mind at issue here is [the officer's] assessment of the facts before him, *i.e.*, did

> he believe that Floyd did not know the car was stolen. * * * The *Harlow* standard requires that we make an objective analysis of the reasonableness of conduct in light of the facts actually known to the officer and *not consider the individual officer's subjective assessment of those facts.* * * * It was to prevent such inquiries that the Supreme Court eliminated from the test for qualified immunity consideration of "permissible intentions."

Ibid. (emphasis added). The proper inquiry, the court ruled, was whether the defendant "or *any other officer in his shoes could reasonably have believed* that Floyd knew the car was stolen." *Id.* at 5 (emphasis added). Because a competent officer in the defendant's shoes could have reached that conclusion, the First Circuit held that the defendant was entitled to immunity. *Id.* at 5-6.

In *Brady*, the First Circuit again squarely rejected efforts to inject an officer's subjective assessments of the facts before him—his subjective beliefs—into the Fourth Amendment and qualified immunity analyses. The similarity between the facts in *Brady* and this case could not be more striking. In *Brady*, as here, the plaintiff was arrested under a warrant that gave his "name, date of birth, and Social Security number." 187 F.3d at 106. In *Brady*, as here, the warrant was issued in error because the plaintiff's brother had appropriated his identity. In that case, the plaintiff's brother, when stopped for drunk driving, had "palmed himself off" as the plaintiff. When the brother failed to appear for trial, a warrant was issued for the plaintiff. *Ibid.* In *Brady*, as here, the plaintiff sought to hold the officers liable for detaining him under the warrant despite "'actual knowledge' of his innocence." *Id.* at 113. Citing certain discrepancies, he argued that the officers had detained him even though they had determined that "he was a victim of mistaken identities" and thus had "come to 'know' that" he was innocent. *Id.* at 112, 113.

The First Circuit rejected that argument because it conflates "knowledge" with "subjective belief." The court observed that, absent a showing that the officers had been "percipient witnesses to the drunk driving incident"—and thus personally saw that it was committed by the plaintiff's brother and not the plaintiff—"the worst one can say about the" officers "is that they came to believe, with some degree of subjective certainty, that the man they had arrested, though named in the warrant, was innocent of the underlying [drunk driving] charge. This is not knowledge, but subjective belief * * * ." *Id.* at 113. "[T]his kind of subjective belief," the First Circuit held, is "irrelevant to Fourth Amendment probable cause analysis." *Ibid.* The officers were entitled to qualified immunity, the First Circuit further held, because they "scrupulously executed a judicial order—the arrest warrant that bore [the plaintiff's name]—according to its terms." *Id.* at 116. *Brady* thus recognizes and holds that, in the context of Fourth Amendment and qualified immunity cases, the term "knowledge" refers to (and permits consideration of) the objectively observable information before the officer, not what the particular officer allegedly concluded from his observations.

The Ninth Circuit here reached precisely the opposite result. Departing from *Floyd*, the Ninth Circuit declined to ask whether "another" reasonably competent "officer, standing in [Agent Gregory's] shoes and having the same information" that Agent Gregory had, "could reasonably have believed" that respondent was the person sought by Florida authorities when they issued the warrant. *Floyd*, 765 F.2d at 5. Instead, the Ninth Circuit held that the case turns on whether Gregory somehow came to believe and thus "knew" that respondent was innocent, because no reasonable officer would believe that he is "entitled knowingly to arrest the wrong man." App., *infra*, 9a. That is precisely what *Floyd* proscribes—efforts to defeat qualified immunity based on the officer's "subjective state

of mind," such as whether his "*own evaluation* of the facts" led him to believe that the arrestee was innocent.

Just like the defendants in *Brady*, moreover, Agent Gregory "scrupulously" relied on a facially valid warrant, allegedly causing the arrest of the person whose name, Social Security number, and birth date were set forth therein. *Brady*, 187 F.3d at 116. Agent Gregory, like the defendants in *Brady*, was not a "percipient witness" to the crimes specified in the warrant and thus could not "know" that respondent was innocent. *Id.* at 114. Consequently, as in *Brady*, the most that can be said is that, according to respondent, Agent Gregory "believe[d], with some degree of subjective certainty, that" respondent "was innocent of the underlying charge." *Ibid.* As the First Circuit held, that "is not knowledge, but subjective belief," and therefore "irrelevant." *Ibid.* The Ninth Circuit, by contrast, held that Agent Gregory's alleged subjective conclusion that respondent was innocent is "knowledge" that by itself defeats qualified immunity. It is difficult to imagine more diametrically opposed resolutions of the same question.[3]

---

[3] The Ninth Circuit has adhered to that approach. For example, in *Henshaw* v. *Daugherty*, No. 04-15619, 125 Fed. Appx. 175, 2005 WL 756105 (9th Cir. March 23, 2005), the Ninth Circuit denied qualified immunity, relying on the plaintiff's allegation that the officers arrested him even though they "knew" (*i.e.*, they subjectively concluded) that the complaining witness had made up his story. Appellees' Br., 2004 WL 2097262 at 4, 8 (Aug. 12, 2004); Appellant's Reply Br., 2004 WL 2297712 at 3-4 (Sept. 8, 2004). Citing *Gregory*—and without asking whether a reasonable officer could have believed the complainant's story—the Ninth Circuit held that qualified immunity was unavailable because officers cannot "knowingly rel[y] on false information to manufacture probable cause * * *." 125 Fed. Appx. at 176, 2005 WL 756105, at *1.

B. The Lower Federal Courts Are In Disarray Over This Issue

The same conflict repeats itself throughout the courts of appeals and district courts. For example, in *Gay* v. *Wall*, 761 F.2d 175, 176 (1985), the Fourth Circuit held that a plaintiff may defeat qualified immunity by alleging that the officer "actually knew"—*i.e.*, subjectively concluded—that he was innocent despite facts arguably sufficient to establish probable cause. There, the plaintiff was arrested under a warrant when "two eye-witnesses identified [him] from a picture line-up as the robber who had shot a police officer" (although the police determined that his "fingerprints did not match those at the crime scene"). *Ibid.* Relying on the plaintiff's allegation that the officers, following his arrest, admitted that they had "no case" against him, that they "did not believe [he] was guilty," and that they planned to release him when they "found the right guy," the Fourth Circuit denied immunity. *Ibid.* Without addressing whether the evidence before the officer, objectively assessed, was arguably sufficient to justify detention, the court stated: The plaintiff "contends that the defendants had actual knowledge of his innocence, yet detained him until they could 'find the right man.' * * * If [the] allegation is true * * * the defendants' conduct may well be actionable under § 1983." *Id.* at 178-179.[4]

The Sixth Circuit likewise has held that qualified immunity is unavailable if the plaintiff alleges "that the officer knew she was the wrong person." *Sanders* v. *City of Flatwoods*, No. 90-5540, 1991 WL 100588, at *2 (6th Cir.

---

[4] In *Brooks* v. *City of Winston-Salem*, 85 F.3d 178, 184 n.5, 185 (1996), the Fourth Circuit indicated that *Gay*, insofar as it found a substantive due process right to release *after* arrest, was overruled by *Albright* v. *Oliver*, 510 U.S. 266 (1994). See *Brady*, 187 F.3d at 110 (to the extent *Gay* can be read to address Fourth Amendment claims in the post-arrest context, "we must reject it").

June 11, 1991) (Table); see 6th Cir. R. 28(g) (allowing citation of unpublished opinions for "precedential value" if "there is no published opinion that would serve as well"). In that case, the plaintiff (Ellan T. Sanders) alleged that the officer had arrested her under a warrant issued for her daughter (Ellan P. Sanders), who lived at the same address. Claiming that the officer had offered to release her if she told him where her daughter was, the plaintiff asserted that the officer "knew the warrant" was intended for her daughter but detained her "to coerce her into divulging" her daughter's whereabouts. *Id.* at *3. Without addressing whether a reasonable officer could have thought the warrant was for plaintiff, the Sixth Circuit denied immunity: If "the arrest was made to coerce her into divulging the location of the person for whom the officer knew the warrant was actually intended, the unlawfulness of his actions should have been 'apparent' to him. No reasonable officer could have thought it lawful to arrest an innocent person under a warrant intended for another, hoping to learn the other person's whereabouts." *Ibid.* Those rulings, like the Ninth Circuit's in this case, cannot be reconciled with the First Circuit's decisions in *Floyd* and *Brady*.

The federal courts continue to grapple with this issue and reach conflicting results in case after case. Contrast *Egervary* v. *Young*, 159 F. Supp. 2d 132, 180 n.37 (E.D. Pa. 2001) (holding that an "examination of the 'information possessed' by the officials is an examination of their subjective thoughts," and ruling that only a jury could decide what those "subjective thoughts" were, *i.e.*, "what [defendants] knew based on the facts and circumstances"); *Hebein* v. *Young*, 37 F. Supp. 2d 1035, 1043 (N.D. Ill. 1998) (analysis of objective reasonableness "does take into account the subjective view of the defendant"), with *Fletcher* v. *Tom Thumb, Inc.*, No. Civ. 99-1680DWFSR, 2001 WL 893913 (D. Minn. Aug. 7, 2001) (holding that "qualified immunity stands or falls on the objective reasonableness of the offi-

cers' actions, not their subjective state of mind"; granting qualified immunity without "speculat[ing]" what the defendant "thought"). See also *Miller*, 680 F.2d at 42 (expressing uncertainty as to whether "it might be a * * * different case" if the plaintiff alleged that the officer "knew [the warrant was] based on mistaken identity"). This Court should grant the petition to resolve the conflict and confusion.

III. The Ninth Circuit's Decision Has Significant And Widespread Consequences For Law Enforcement

A. The Decision Undermines Qualified Immunity By Preventing Its Resolution Before Trial

Because qualified immunity "is an *immunity from suit* rather than a mere defense to liability," this Court "repeatedly ha[s] stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Saucier*, 533 U.S. at 200-201 (internal quotation marks omitted). The Ninth Circuit's decision, however, makes such issues almost impossible to resolve before trial. Where an innocent person is arrested, it is virtually inconceivable that the police will have been wholly unaware of *any* circumstances suggesting that they had the wrong individual. Under the Ninth Circuit's decision, those circumstances give rise to a triable issue over whether the officer "knew"—*i.e.*, whether the officer subjectively concluded—that he was arresting an innocent person. Even if the objective information before an officer otherwise establishes probable cause, summary judgment is unavailable whenever the plaintiff alleges that the officer knew he was making a mistake, because "an officer cannot have probable cause to believe the person arrested has committed the crime * * * when he knows the warrant identifies another person." App., *infra*, 9a. Whether the officer "knew or did not know he was causing the arrest of the wrong man" would almost always be "an issue reserved to the trier of fact at trial." *Id.* at 10a. Just like the Ninth Circuit decision this Court summarily

reversed in *Hunter* v. *Bryant*, 502 U.S. at 228, the Ninth Circuit's decision here "routinely places the question of immunity in the hands of the jury." Immunity, however, "ordinarily should be decided by the court long before trial." *Ibid.*

This case demonstrates the dramatic impact of the Ninth Circuit's approach. The court of appeals found no dispute over the evidence before Agent Gregory. The Florida warrant set forth the name used by respondent, as well as his Social Security number, birth date, race, and approximate height. Indeed, respondent *was* the person named in the warrant: Florida authorities simply issued the warrant in respondent's name, with his Social Security number, and birth date, because respondent's brother had assumed respondent's identity while committing crimes in Florida. The evidence, moreover, shows that Agent Gregory *subjectively* believed respondent was named in the Florida warrant. After finding the warrant, Agent Gregory advised the FBI's Philadelphia Office that, "[i]n view of [respondent]'s hang-up phone call *and status as a fugitive himself*, he appears unlikely to provide any information regarding his brother, Robert Lee." C.A. E.R. 76 (emphasis added). All of that, however, is overcome—and Agent Gregory now must endure a trial—because of respondent's claim that Gregory inferred and thus "knew" that Florida authorities had mistakenly issued the warrant for him rather than his brother. The Ninth Circuit effectively imposes a standard of near perfection: Any countervailing fact to which a plaintiff can point in support of "actual knowledge" precludes summary judgment on qualified immunity.

"It is not difficult for ingenious plaintiff's counsel to create a material issue of fact on some element of the immunity defense where * * * a decisionmaker's mental processes are involved." *Harlow*, 457 U.S. at 817 n.29. That is precisely what the Ninth Circuit's decision allows, and "[t]he effect of this development upon the willingness of

individuals to serve their country is obvious." *Ibid.* "If an officer executing an arrest warrant must do so at peril of" litigation any time "there is any discrepancy in the description of the warrant * * * , many a criminal will slip away." *Johnson* v. *Miller*, 680 F.2d at 41. Officers can act decisively "without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages and only if unjustified lawsuits are quickly terminated." 468 U.S. at 195. If claims regarding what the officer thought or concluded from the information before him are permitted to defeat probable cause and qualified immunity, the protections of qualified immunity are all but lost.

That result is particularly problematic where, as here, officers act on a warrant they had no role in procuring. If officers executing such a warrant must endure trial and confront potential liability whenever the warrant is in error, officers will be forced to conduct their own investigations before executing facially valid warrants. Worse, officers may simply have to decline to enforce warrants where resources do not permit a duplicate investigation. The Ninth Circuit's rule thus "pits the officer against the decision of the judicial authority issuing the warrant," barring him from complying with the command "to arrest unless he himself can ascertain that an arrest is in order." *Bur* v. *Gilbert*, 415 F. Supp. 335, 340-41 (E.D. Wis. 1976). Law enforcement cannot function if each officer must verify the accuracy of every judicial warrant he is asked to execute.

B. The Issue Is Of Recurring And Increasing Importance In Many Contexts

This issue, moreover, is of recurring and increasing importance. Day after day, officers must make difficult on-the-spot judgments whether the person they encounter is the person named in the warrant. See pp. 19-25, *supra*; *Hill* v. *Scott*, 349 F.3d 1068 (8th Cir. 2003) (arrest of Brian

Arthur Hill on warrant for Brian Walter Hill). Moreover, with identity theft rampant, criminals can pose as others when committing crimes or when apprehended. That creates an ever-increasing risk that officers will be subjected to suit when warrants are issued for, and unwittingly executed against, the victims of identity theft. Precisely that happened here, and the Federal Reporters are replete with similar cases. See, *e.g.*, *Young* v. *City of Little Rock*, 249 F.3d 730, 732 (8th Cir. 2001) (plaintiff arrested under warrant after sister committed crimes while using her identifying information); *Kennell* v. *Gates*, 215 F.3d 825 (8th Cir. 2000) (plaintiff arrested where warrant listed her name as an alias for her sister); *Brady*, 187 F.3d at 106 (warrant issued for plaintiff because brother, when arrested for drunk driving, passed himself off as plaintiff); *Hallock* v. *United States*, 253 F. Supp. 2d 361 (N.D.N.Y. 2003) (claim that warrant was issued because the plaintiff "was the victim of 'identity theft,' whereby his identifying information was used to establish a child pornography web site"); *Baker* v. *McCollan*, 443 U.S. at 137 (plaintiff arrested on warrant as fugitive after his brother, who had posed as plaintiff when arrested, did not appear for trial). With identity theft increasing at exponential rates, this issue is likely to recur with increasing frequency.[5]

At the same time, effective law enforcement increasingly requires officers to rely on warrants they had no role in

---

[5] The Federal Trade Commission (FTC) reports that, since it assumed the duty to serve as a clearinghouse for identity theft complaints seven years ago, 18 U.S.C. § 1028, the number of complaints has more than quadrupled—from 31,117 in 1999, to 86,212 in 2001, to 161,896 in 2002, to 215,093 in 2003, and to 246,570 in 2004. FTC, National & State Trends In Fraud & Identity Theft, Jan.-Dec. 2004 at 9 (2005) (avail. http://www.consumer.gov/sentinel/pubs/Top10Fraud2004.pdf); FTC, National & State Trends In Fraud & Identity Theft, Jan.-Dec. 2003 at 9 (2004) (avail. http://www.consumer.gov/sentinel/pubs/Top10Fraud2003.pdf).

procuring. Today more than ever, crime is interstate and international in dimension, necessitating close cooperation among state, local, and federal officers, including mutual execution of search and arrest warrants.[6] Precisely when that need for cooperation is greatest, however, the Ninth Circuit has made it most perilous, exposing officers who do no more than execute a facially valid warrant to trial if there is any discrepancy from which they could conceivably have inferred mistake—and to potentially ruinous liability based on the jury's conclusion about what the officer allegedly thought rather than findings about the information before him.

The Ninth Circuit's decision also portends serious consequences in other contexts. For example, any time a plaintiff is subjected to an unsuccessful search, the plaintiff will be entitled to avoid summary judgment so long as he alleges that the searching officers, based on some allegedly excul-

---

[6] Congress in recent years has established new federal offices to promote such cooperation in the national security context. 6 U.S.C. § 361 (establishing "the Office of the Secretary for the Office for State and Local Government Coordination" in the Department of Homeland Security "to oversee and coordinate departmental programs for and relationships with State and local governments"); 6 U.S.C. § 112(c)(3) (charging the Department of Homeland Security with "distributing or, as appropriate, coordinating the distribution of, warnings and information to State and local government personnel, agencies, and authorities and to the public"); Exec. Order No. 13,356, 69 Fed. Reg. 53599 (Sept. 1, 2004) ("giv[ing] the highest priority to * * * the interchange of terrorism information between agencies and appropriate authorities of States and local governments * * *"). Cooperation yields results. During Operation FALCON, more than 800 different federal, state, and local law enforcement agencies cooperated to arrest 10,000 fugitives on outstanding warrants in a brief period of time. CNN, Dragnet Nabs 10,000 Fugitives, April 14, 2005 (avail. http://www.cnn.com/2005/LAW/04/14/fugitive.arrests/index.html); Press Release, Operation FALCON a National Success, Apr. 14, 2005 (avail. http://www.usmarshals.gov/district/va-w/news/chron/2005/041405.htm).

patory item or statement, "knew" they would find no evidence. Likewise, claims of malicious prosecution will routinely have to go to trial. Ordinarily, government officials need not fear those claims because plaintiffs must show that "the prior proceeding was without probable cause." *Heck* v. *Humphrey*, 512 U.S. 477, 485 n.4 (1994). But a defendant acquitted after a criminal trial surely can point to some exculpatory evidence or weakness in the case against him—given acquittal, there presumably will be some—and allege that the defendant "actually knew" he was innocent. Under the court of appeals' reasoning, that will be sufficient to require trial, since an official "cannot have probable cause" to press charges against someone "he knows" to be innocent. App., *infra*, 9a. The Ninth Circuit's decision thus resurrects, under the guise of "knowledge," the subjective "good faith" requirement this Court rejected in *Harlow*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JEFFREY A. LAMKEN
Counsel of Record
MARK T. STANCIL
JACOB A. SOMMER
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., NW
Washington, D.C. 20004-2400
(202) 639-7700

SEPTEMBER 12, 2005

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JULIAN C. LEE,
PLAINTIFF-APPELLEE,

v.

JAKE GREGORY, UNITED STATES OF AMERICA,
DEFENDANTS-APPELLANTS,

AND

THE FEDERAL BUREAU OF INVESTIGATION,
DEFENDANT.

No. 02-57132

Argued and Submitted Feb. 6, 2004.
Filed April 7, 2004.

Before: NOONAN, THOMAS, and BEA, Circuit Judges.

BEA, Circuit Judge:

In July 1999, Federal Bureau of Investigation ("FBI") Special Agent Jake Gregory ("Gregory") was assigned to assist with a nationwide search for federal fugitive Robert Q. Lee ("Robert") by finding and interviewing Robert's brother Julian Christopher Lee ("Julian"). When Gregory located Julian in April 2000, Julian angrily declined to speak with him. Gregory then obtained a copy of an outstanding Florida arrest warrant for "Christopher Lee," Julian's middle name and one of Robert's aliases, known as such to

the FBI. Gregory passed the warrant to the San Diego Sheriff's Office, which arrested Julian, and released him on bail four days later. Julian filed this action against Gregory, the FBI, and the United States of America, alleging his arrest gave rise to a *Bivens* cause of action[1] against Gregory, and to several causes of action against the other defendants. Gregory moved for summary judgment, contending that he was entitled to qualified immunity. The district court denied Gregory's motion. We affirm.

I. JURISDICTION AND STANDARD OF REVIEW

Although a denial of summary judgment is not ordinarily appealable, we have jurisdiction over Gregory's interlocutory appeal because the ground for the motion is qualified immunity. *Bingham v. City of Manhattan Beach*, 341 F.3d 939, 942 (9th Cir. 2003). We review the district court's denial of summary judgment de novo. *Id.* at 945. Our review is limited to issues of law. *Id.* at 942.

The district court's determination that the parties' evidence presents genuine issues of material fact is not reviewable on an interlocutory appeal. *Mendocino Environmental Ctr. v. Mendocino County*, 192 F.3d 1283, 1291 (9th Cir. 1999). Thus, we limit our review to the question whether, assuming all conflicts in the evidence are resolved in Julian's favor, Gregory would be entitled to qualified immunity as a matter of law. *Id.*; *see also, Jeffers v. Gomez*, 267 F.3d 895, 903 (9th Cir. 2001) ("Where disputed facts exist, however, we can determine whether the denial of qualified immunity was appropriate by assuming that the version of the material facts asserted by the non-moving party is correct.").

---

[1] *Bivens v. Six Unknown Named Agents of Federal Narcotics Bureau*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) held that an unconstitutional search and seizure in violation of the Fourth Amendment by a federal agent acting under color of his authority gives rise to a cause of action for damages.

II. BACKGROUND

The following facts are taken from the record and the district court's order denying summary judgment. Julian's brother Robert had been a fugitive since 1994. The Gloucester County, New Jersey prosecutor's office sought to prosecute him on state robbery and assault charges, but Robert fled. In 1997, the U.S. District Court for the District of New Jersey issued a warrant for Robert's arrest for unlawful flight to avoid prosecution. In the course of the FBI's search for Robert, the Philadelphia FBI office asked the Sacramento FBI office to assist by locating and interviewing Robert's brother Julian.

The Sacramento office found addresses for Julian in the San Diego area and asked the San Diego FBI office for local assistance. In July 1999, Gregory was assigned to find and interview Julian. Gregory inherited the file from another San Diego agent who had interviewed several of Julian's friends.

When Gregory took over the case, the FBI file contained the following information about Julian: he had a California driver's license; he was six feet three inches tall and weighed 270 pounds; he had several California addresses dating back to 1995; in 1997 he had moved to Alaska to work in the commercial fishing industry; and, he occasionally used his middle name, Christopher. The FBI file contained the following information about Robert: he used multiple names, social security numbers, and birthdays; in a 1992 mugshot he was described as six feet tall and weighing 160 pounds; in a 1994 mugshot he was described as six feet tall and weighing 180 pounds; as of February 1997, prosecutors believed that he was living in Alabama under the name Christopher Lee and using Julian's birthday and social security number. Gregory admitted at deposition that all of this information was contained in the file that he received and reviewed in 1999. The file also contained information about an outstanding arrest warrant for aggravated battery

and burglary with assault or battery from Dade County, Florida, issued for Christopher Lee.

In April 2000, continuing his efforts to locate Julian, Gregory interviewed J.B., a friend of Julian. During the interview, Gregory showed J.B. a photograph of Robert. J.B. stated that Julian was not the man in the photograph. On April 21, 2000, Gregory went to Julian's house and left his business card. Julian called Gregory that afternoon and asked whether the law required him to speak with Gregory. Gregory replied that it did not, whereupon Julian angrily told Gregory to stop harassing him, cursed at Gregory, and hung up the phone.

Gregory immediately called the Dade County Sheriff's Department and asked them to fax him a copy of the warrant for Christopher Lee. The warrant, which was issued on December 4, 1998, sought "Christopher Lee" on battery and burglary charges. It described Christopher Lee as a black male, six feet one inch tall and 200 pounds and gave a Florida address and driver's license number. The date of birth and social security number on the warrant were the same as Julian's.

On April 21, 2000, Gregory passed the warrant to the duty sergeant at the San Diego Sheriff's Office ("SDSO") and asked whether the SDSO would be interested in executing the warrant. He told the SDSO that he had located the man named in the warrant. Gregory noticed the discrepancy between the physical description in the warrant (six feet one inch, 200 pounds) and Julian's California DMV record (six feet three inches, 270 pounds). The parties dispute whether Gregory informed the SDSO of the discrepancy; Gregory admitted that he could not recall ever seeing a discrepancy between a warrant's description and actual appearance greater than thirty to forty pounds. The parties also dispute whether Gregory told the SDSO that Robert had appropriated Julian's identity (middle name,

social security number, and birthday); both arresting officers testified that Gregory did not.

On May 4, 2000, the SDSO arrested Julian. One of the arresting officers telephoned Gregory to let him know of Julian's arrest. Gregory went to the SDSO to interview Julian. During the interview, Julian told Gregory that he had never been to Florida, he was not the man named in the warrant, and he had not spoken to his brother in years. Gregory told Julian that if he cooperated by providing information about Robert it might help with his Florida case. At the conclusion of the interview, Gregory told Julian to have a nice trip to Florida.

The SDSO held Julian for four days before he posted bail. During that time, Florida authorities began extradition proceedings, and Julian was charged under a California statute with being a fugitive. About two weeks after Julian's release, his lawyer telephoned Gregory. The lawyer told Gregory that he believed the warrant did not apply to Julian. Gregory contacted officials in Florida and sent them information about and photographs of Robert. The Florida officials compared Robert's mugshot with the Florida driver's license photo of "Christopher Lee." The photos matched and the Florida officials informed Gregory that the warrant was for Robert Lee using the alias "Christopher Lee" and therefore not for Julian. When Gregory relayed this to the San Diego District Attorney's office, all charges against Julian were dropped.

In April 2001, Julian filed his civil action against Gregory, the FBI, and the United States. After the district court granted in part and denied in part defendants' motion to dismiss, Julian's surviving complaint alleged one *Bivens* cause of action against Gregory and several other causes of action against the other defendants. Julian's complaint alleges that Gregory violated his Fourth Amendment rights by arresting him without probable cause. He alleges that Gregory knew that Julian was not the man sought by the

Florida warrant, but arrested him anyway in order to obtain information about Robert.

Gregory moved for summary judgment on qualified immunity grounds. He argued that he did not violate Julian's constitutional rights because he had probable cause to arrest Julian, and that no clearly established law prohibited him from executing a facially valid warrant. The district court found that there were disputed issues of material fact as to what information Gregory gave to the SDSO and, more importantly, as to whether Gregory actually knew that the warrant did not apply to Julian. The district court denied Gregory's motion for summary judgment. Gregory filed a timely notice of appeal.[2]

III. DISCUSSION

Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). The qualified immunity inquiry involves two sequential questions. First: "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). Second: "if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step, is to ask whether the right was clearly established . . . in light of the specific context of the case." *Id.*

---

[2] The district court's order also denied the United States's motion for summary judgment on several causes of action and granted the motion to strike the portion of the complaint seeking punitive damages from the United States. These rulings were not appealed, and are not presently before this court.

A. Taken In the Light Most Favorable To Plaintiff, The Disputed Facts Show a Constitutional Violation

Gregory first contends that he did not violate Julian's constitutional rights at all because he had probable cause to believe that the person named in the facially valid Florida warrant was in fact Julian and his motive in arresting Julian to pressure him for information about Robert is therefore irrelevant to the Fourth Amendment analysis.

Gregory is correct that allegations of ulterior motives cannot invalidate police conduct that is justified by probable cause. *Whren v. United States*, 517 U.S. 806, 811-15, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). Thus, if his motive in causing Julian's arrest was to squeeze Julian for information about Robert, *Whren* does render such motive irrelevant. However, Gregory's contention ignores the fact that his conduct must be " 'objectively reasonable' *in light of the facts and circumstances confronting [him]*, without regard to [his] underlying intent or motivation." *Graham v. Connor*, 490 U.S. 386, 397, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) (emphasis added). Gregory's actions are not impugned because of his motive, but because of his claimed *knowledge* that Julian was not the person named in the Florida arrest warrant.

Julian contends that in light of the facts and circumstances confronting Gregory, Gregory actually knew that the Florida warrant applied not to him, but to Robert. The district court found the evidence presented a genuine issue of material fact as to whether Gregory actually knew that the warrant did not apply to Julian. We may not review that determination. *Mendocino Envtl. Ctr.*, 192 F.3d at 1291. Gregory's contention that his actual knowledge should be ignored is completely without merit.[3]

---

[3] Gregory's contention that he did not cause Julian to be arrested because he merely passed the warrant to the SDSO is similarly without merit. Gregory told the SDSO that he had located the

Knowingly arresting the wrong man pursuant to a facially valid warrant issued for someone else violates rights guaranteed by the Fourth Amendment. *See Brown v. Byer*, 870 F.2d 975 (5th Cir. 1989) ("The existence of a facially valid warrant for the arrest of one person does not authorize a police officer to effect the arrest of another person. . . ."). Thus, Julian has presented facts which, if accepted by a reasonable trier of fact, would show that Gregory violated his constitutional right to be free from an unreasonable seizure. The district court did not err in finding that the disputed facts, taken in the light most favorable to Julian, show a constitutional violation.

B. Clearly Established Law Gives Reasonable Officers Notice That Knowingly Arresting the Wrong Person Violates the Rights Guaranteed by the Fourth Amendment

Gregory contends that even if there is an issue of fact as to whether he violated Julian's Fourth Amendment rights, there is no clearly established law that would have provided him with notice that his actions were unlawful. To determine whether a right was "clearly established" we ask "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202, 121 S.Ct. 2151.

Some wrongs are self-evident. "[E]ven if there is no closely analogous case law, a right can be clearly established on the basis of 'common sense.'" *Giebel v. Sylvester*, 244 F.3d 1182, 1189 (9th Cir. 2001) (citation and internal quotation marks omitted). There is no requirement that courts have previously ruled "the very action in question" unlawful. *Anderson v. Creighton*, 483 U.S. 635, 640, 107

---

individual named in the warrant and passed on Julian's address. A police officer is "responsible for the natural consequences of his actions." *Malley v. Briggs*, 475 U.S. 335, 345, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986).

S.Ct. 3034, 97 L.Ed.2d 523 (1987). No reasonable officer would believe that he is entitled knowingly to arrest the wrong man pursuant to a facially valid warrant the officer knows was issued for someone else. Every officer knows, or should know, that he needs a warrant which correctly identifies the arrestee, or probable cause, to arrest a particular individual.

This court, sitting en banc after *Saucier*, has found a clearly established right against being criminally charged based on deliberately fabricated false evidence even though there were no prior cases expressly recognizing the specific right—"[p]erhaps because the proposition is virtually self-evident." *Devereaux v. Abbey*, 263 F.3d 1070, 1074-75 (9th Cir. 2001) (en banc). Similarly, this court has stated "no particularized case law is necessary for a deputy to know that excessive force has been used when a deputy sics a canine on a handcuffed arrestee who has fully surrendered and is completely under control." *Mendoza v. Block*, 27 F.3d 1357, 1362 (9th Cir. 1994). Knowingly arresting the wrong person is the same kind of self-evident wrong because an officer cannot have probable cause to believe the person arrested has committed the crime described in a warrant when he knows that the warrant identifies another person.

Even were it not self-evident, knowingly causing the arrest of the wrong person is plainly unlawful in light of past precedent. *See Mendocino Envtl. Ctr.*, 192 F.3d at 1292-95 (where district court found a factual dispute over the source and veracity of statements on which officers allegedly relied for probable cause to arrest plaintiffs, officers were not entitled to qualified immunity). Although the facts in *Mendocino Environmental Center* are different from the facts in issue here, "[a]n officer is not entitled to qualified immunity on the grounds that the law is not clearly established every time a novel method is used to inflict injury." *Mendoza*, 27 F.3d at 1362.

IV. CONCLUSION

Of course, we do not determine whether Gregory knew or did not know he was causing the arrest of the wrong man when he turned the SDSO on to Julian. That is an issue reserved to the trier of fact at trial, if a trial takes place. We merely hold that the district court did not err in finding that the disputed facts, viewed in the light most favorable to Julian, create a triable issue of fact: whether Gregory knew he was causing the arrest of the wrong man. If established, such wrongful arrest would be sufficient to constitute a constitutional violation. We further hold that clearly established law provides notice to a reasonable officer that arresting a man pursuant to a facially valid warrant that the officer knows does not apply to the man arrested is unlawful. The district court correctly denied Gregory's motion for summary judgment made on qualified immunity grounds. The order of the district court is AFFIRMED.

APPENDIX B

TITLE OF APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JULIAN C. LEE, AN INDIVIDUAL,
PLAINTIFF,

VS.

JAKE GREGORY, UNITED STATES OF AMERICA,
AND DOES 1 THROUGH 10, INCLUSIVE,
DEFENDANTS,

CASE NO. 01CV0739-K (RBB)

---

(1) ORDER DENYING DEFENDANT GREGORY'S MOTION FOR SUMMARY JUDGMENT

(2) ORDER DENYING DEFENDANT UNITED STATES' MOTION FOR SUMMARY JUDGMENT

(3) ORDER GRANTING DEFENDANT UNITED STATES' MOTION TO STRIKE

Filed October 11, 2002.

The Court considers Defendant Jake Gregory's motion for summary judgment and Defendant United State[s] of America's motion for summary judgment and motion to strike, both filed on September 9, 2002. Plaintiff opposes both motions for summary judgment. The motion to strike

is unopposed. The Court has federal question and supplemental jurisdiction.

On July 3, 2001, Plaintiff filed his First Amended Complaint ("FAC") asserting eleven causes of action against both Jake Gregory ("Agent Gregory") and the United State[s] of America ("Defendant"). On September 7, 2001, both Defendants filed a motion to dismiss, or in the alternative, for summary judgment. On October 3, 2001, this Court denied Defendants' motion for summary judgment and granted in part and denied in part the motion to dismiss (this Court dismissed three causes of action, allowing eight remaining causes of action to stand).

As the FAC currently stands, it alleges one cause of action against Agent Gregory, and seven causes of action against Defendant United States of America. The sole cause of action against Agent Gregory is a *Bivens* action. The seven causes of action against the Defendant United States of America are as follows: (1) False Arrest and Imprisonment; (2) Malicious Prosecution; (3) Abuse of Process; (4) Battery; (5) Intentional Infliction of Emotional Distress; (6) Negligence; and (7) Negligent Infliction of Emotional Distress.

Agent Gregory moves for summary judgment in the sole cause of action against him. Defendant United States of America moves for summary judgment on all causes of action, as well as a motion to strike reference to punitive damages. The Court will look at each motion in turn.

I. Background

The following is taken from the parties' pleadings and is not to be construed as findings of fact by the Court.

A. Plaintiff's Complaint

In his FAC, Plaintiff alleges the following facts: Plaintiff was born on March 7, 1967. Plaintiff has a military background and no criminal history or record. Plaintiff has a brother named Robert Lee, a fugitive wanted on robbery

and assault charges in New Jersey dating from 1994. Robert Lee is estranged from his family and has not had any contact with any of them for a number of years. Robert has adopted many aliases over the past few years, including using the name and social security number of his brother, Plaintiff Julian Christopher Lee. Plaintiff alleges that the FBI was aware of this and routinely checked with Plaintiff's parents to determine whether Robert had been in contact with them.

According to the complaint, in late 1998, Defendant Jake Gregory, an FBI agent, contacted Plaintiff's old roommate Grace Kessler and ex-girlfriend Jana Dubraveak. Gregory allegedly told them that his inquiry concerned Plaintiff's brother Robert, not Plaintiff. They both told Gregory that they did not know how to contact Plaintiff.

In April of 2000, Gregory contacted another old roommate of Plaintiff's, J.B., and asked him to come to Gregory's Carlsbad office to answer some questions. At the office, Gregory showed J.B. a photo of Robert Lee, and J.B. told Agent Gregory that he had never seen Robert Lee before. On April 28, 2000, Agent Gregory came to Plaintiff's house in Encinitas, California while Plaintiff was at work. Gregory spoke to Plaintiff's girlfriend's brother, Brian Ingraham. Gregory told Ingraham that his inquiry involved Plaintiff's brother, not Plaintiff, and left his business card and a note for Plaintiff to contact him.

Upon receiving the note, Plaintiff called Gregory back the same day. Plaintiff claims that he told Gregory that he had no idea where his brother was and that he had not spoken to him in a number of years. Plaintiff also demanded that Gregory stop following him and harassing his friends and acquaintances as neither he nor they knew the location of Robert Lee. Plaintiff then hung up the phone.

The following week, on May 4, 2000, a San Diego County Sheriff's Deputy was in Plaintiff's neighborhood ques-

tioning his neighbor about Plaintiff and his brother Robert. Later on the same day, Plaintiff's girlfriend, Sarah, saw a sheriff's car parked on the street and spoke with the deputy in the car, Marco Garmo. Deputy Garmo informed her that he was working for the FBI on the case involving Robert Lee and that there was an outstanding warrant for his arrest from Florida. Sarah explained to Deputy Garmo that the FBI had been looking for Robert Lee for years and that all she knew about Robert was that he was estranged from the Lee family. Plaintiff's girlfriend called him immediately and Plaintiff then called Deputy Garmo on Garmo's celiular phone, and explained to him that he had not spoken to his brother in years and did not know where he was.

Later that night, Plaintiff went to the supermarket. As he pulled into the parking lot, he was surround by several sheriff's cars and was ordered out of his car at gunpoint by the sheriffs, including Sheriff's Deputy Garmo. The officers told Plaintiff that he was being arrested on the Florida warrant. The Florida warrant had been issued in Plaintiff's name and social security number ("SSN"), though some of the physical characteristics did not match (e.g. there was a significant difference between the weight of the person wanted in Florida [200 lbs.] and Plaintiff's weight [270 lbs.]). The officers handcuffed Plaintiff, place him under arrest, and took him to the Encinitas Sheriff's Station.

Upon Plaintiff's arrival at the station, still handcuffed, he was placed in a room with FBI Agent Gregory. Plaintiff alleges that Gregory demanded that Plaintiff give him information on his brother, and that he said he would be able to clear up the "Florida situation" if Plaintiff gave him information on his brother. Plaintiff claims that he told Agent Gregory that he did not know where his brother was and that he had not heard from him or spoken to him in years, after which Agent Gregory allegedly replied "Have a nice trip to Florida" and walked out of the room.

Plaintiff remained in jail four days until he was able to post bail on May 8, 2000. Also on May 8, 2000, extradition papers were filed to begin Plaintiff's extradition to Dade County, Florida. On May 9, 2000, Plaintiff was formally charged under the California Penal Code § 1551.1 with being a fugitive from justice. Shortly thereafter, Plaintiff's friends were able to hire an attorney who contacted the San Diego District Attorney's Office to inform them of Plaintiff's identity and his brother's history. Shortly after these events, Plaintiff was freed and his extradition case was dismissed by the San Diego District Attorney.

B. Defendants' Story

In support of their motion for summary judgment, Defendants submit a sworn affidavit by Agent Gregory, selected FBI "Bulletins," a copy of the Florida warrant, and a letter from the Gloucester County, New Jersey Prosecutor's Office. The following are the facts related by the Defendants: the FBI became involved in investigating the unlawful flight of Robert Lee, Plaintiff's brother, based on robbery and aggravated assault charges dating back to 1994. On or about August 13, 1998, the San Diego FBI received a request to locate and interview the fugitive's brother, Julian Christopher Lee in order to inquire about Robert Lee's whereabouts. An agent spoke to Plaintiff's ex-girlfriend and roommate, neither of whom knew how to contact Plaintiff.

In July of 1999, the San Diego FBI received a second request to follow up on leads on the whereabouts of Robert Lee. The request listed the names and social security numbers of Keith Lee, Willmar Lee, Plaintiff (as "Christopher Lee") and Robert McMullen as possible aliases for Robert Lee (the other aliases were Robert Lee's older brothers' and his cousin's identities). The request listed two addresses for Christopher Lee, one in Miami, Florida and the other in Encinitas, California. The request also stated that "Christopher Lee" was wanted on a Florida warrant

for assault, and that the social security number listed on that individual was the same as that of the Christopher Lee living in Encinitas, California. The request also contained an attachment from the New Jersey prosecutor's office that stated that as of 1997, Robert Lee was known to be using the name "Christopher Lee."

Agent Gregory was assigned to check on the "lead." Gregory went to Plaintiff's house in Encinitas, determined that Plaintiff was not home, and left a card with an individual with the message that Agent Gregory wished to speak to Plaintiff about his brother. Defendants claim that Plaintiff telephoned Agent Gregory, indicated that he did not wish to speak to the FBI, accused the FBI of harassing his friends and hung up.

Defendants claim that Agent Gregory was aware that there was an arrest warrant from Miami for "Christopher Lee" with the same date of birth and SSN as the individual that Gregory had been speaking to in Encinitas. Defendants claim that after Plaintiff refused to speak to Agent Gregory, Gregory believed it was possible that Plaintiff was uncooperative because he knew of the Miami warrant, or possibly that Plaintiff was actually the fugitive Robert Lee. Agent Gregory called the police in Miami and determined that the arrest warrant was for Christopher Lee, that it was current, and that the Miami police were willing to extradite Christopher Lee from anywhere. As California law does not allow federal agents to execute non-federal warrants, Agent Gregory passed on the information about the Miami warrant to the San Diego County Sheriff's Office ("SDSO"), and indicated to his directing office in Sacramento that is was his intention to forego any further investigation as it appeared unlikely that Plaintiff would provide any information about his brother.

However, on May 4, 2000, after the San Diego Sheriffs had arrested Plaintiff and brought him in to the station, Agent Gregory went to the Encinitas Station to determine

whether Plaintiff had any information about his brother. Plaintiff denied any form of contact with his brother for several years. Defendants claim that Agent Gregory informed Plaintiff that if he assisted in locating his brother Robert, it might help Plaintiff's "Florida situation," but they deny that any promises were made.

II. Discussion

Agent Gregory moves for summary judgment in the only cause of action against him, the *Bivens* action. Defendant United States of America moves for summary judgment on all causes of action, as well as a motion to strike reference to punitive damages. The Court will look at each motion in turn.

A. Legal Standard for Summary Judgment, Fed.R.Civ.P. 56(c)

Federal Rules of Civil Procedure 56(c) provides that summary judgment is appropriate if there is no genuine issue as to any material facts, and the moving party is entitled to a judgment as a matter of law. Where the plaintiff bears the burden of proof at trial, summary judgment for the defendant is appropriate if the defendant shows that there is an absence of evidence to support the plaintiff's claims. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *see also Garneau v. City of Seattle*, 147 F.3d 802, 807 (9th Cir. 1998). The movant has the initial burden of demonstrating that summary judgment is proper. *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 157 (1970). The burden then shifts to the nonmovant to show that summary judgment is not appropriate. *Celotex*, 477 U.S. at 324. To make such a showing, the nonmovant must go beyond the pleadings to designate specific facts showing that there is a genuine issue for trial. *Id.* However, in considering this motion, the evidence of the nonmovant is to be believed and all justifiable inferences are to be drawn in his or her favor. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 255 (1986).

Determinations regarding credibility, the weighing of evidence, and the drawing of legitimate inferences are jury functions, and not appropriate for resolution by the court in a motion for summary judgment. *Id.* at 255.

B. Agent Gregory's Motion for Summary Judgment

Plaintiff's *Bivens* cause of action alleges that Agent Gregory deprived Plaintiff of his First, Fourth, Fifth and Eight[h] Amendment right when Agent Gregory caused his arrest knowing Plaintiff was not the person sought in the Florida arrest warrant. Agent Gregory seeks summary judgment because he argues he is entitled to qualified immunity.

In support of his argument, Agent Gregory cites *Saucier v. Katz*, 533, U.S. 194 (2001) to highlight the two-part test mandated for *Bivens* claims. Motion at 10. According to Agent Gregory, the first part of the inquiry is whether "taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right." *Saucier*, 533 U.S. at 200. The second inquiry is "whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case." *Saucier*, 533 U.S. at 201. Agent Gregory provides three arguments supporting his motion for summary judgment. The Court will analyze each argument in turn.

1. Agent Gregory did not violate Plaintiff's constitutional rights

First, Agent Gregory argues that he did not violate Plaintiff's constitutional rights because: (i) he did not arrest Plaintiff or take him into custody; and (ii) he had a facially valid arrest warrant which Agent Gregory believed pertained to Plaintiff, not Plaintiff's brother.

a. Agent Gregory did not arrest Plaintiff nor take him into custody

Agent Gregory argues that because he did not arrest Plaintiff, no constitutional right is implicated. Motion at 11.

The Court does not agree. Plaintiff attacks this argument by stating that there is no case law which states that Agent Gregory must have personally arrested Plaintiff for *Bivens* liability to attach. Plaintiff argues that Agent Gregory procured his arrest when: (i) Agent Gregory called Florida to obtain a copy of the arrest warrant; and (ii) Agent Gregory called the SDSO and requested they help him serve the warrant. Opposition at 7. Furthermore, Plaintiff cites to *Malley v. Briggs*, 475 U.S. 335 (1986) and *Fletcher v. Kalina*, 93 F.3d 653 (9th Cir. 1996) which hold that liability can attach when the officer procures the arrest but is not the arresting officer. Although Agent Gregory attempts to distinguish these cases in his reply, Agent Gregory does not provide any case law which holds that an officer must personally arrest a person for *Bivens* liability to attach.

In his reply, Agent Gregory argues that he did not cause Plaintiff's arrest, "to the contrary, Plaintiff's arrest occurred because of a chain of events over which Agent Gregory had no control." Reply at 7. Agent Gregory contends that Florida issued the warrant, and the SDSO executed it. This argument is unpersuasive because even Defendant admits that the SDSO did not obtain the warrant from Florida, it was provided by Agent Gregory. Motion at 6.

b. Florida arrest warrant was facially valid

Agent Gregory argues that with the information he had, he reasonably believed that the person named in the Florida arrest warrant was the Plaintiff. Agent Gregory contends that the information in the warrant matched the Plaintiff's name, gender, race, date of birth and social security number. Agent Gregory avers that the discrepancy in the physical description (height and weight) was not significant. Furthermore, Agent Gregory argues that since he did not order the SDSO to arrest Plaintiff, his conduct did not violate Plaintiff's Fourth Amendment rights.

Plaintiff, on the other hand, argues that this is the central factual dispute: whether Agent Gregory believed Plaintiff to be the warrant suspect[,] or whether Agent Gregory knew the warrant pertained to Plaintiff's brother and procured the arrest to obtain information on Plaintiff's brother. Plaintiff provides evidence which demonstrates that Agent Gregory was aware that: (i) Plaintiff's brother used Plaintiff's name, date of birth and social security number; (ii) Plaintiff's brother had assumed Plaintiff's identity previously; and (iii) the warrant was for a man described as 6 feet tall and weighed 200 pounds, whereas Plaintiff is 6 feet 3 inches tall and weighs 270 pounds. Opposition at 14. Plaintiff further provides evidence that Agent Gregory never informed the SDSO of the physical discrepancy, nor that Plaintiff's brother had used Plaintiff's information as an alias. Opposition at 15. Refuting that the discrepancy in physical description was not significant, Plaintiff provides evidence that Agent Gregory himself had never seen a discrepancy of more than 30-40 pounds in two or more official documents. Opposition at 7.

Agent Gregory replies that Plaintiff's theory is fundamentally flawed. Agent Gregory argues that: (i) he only had two personal contacts with Plaintiff (the brief telephone call and the interview post arrest); (ii) he had no information associating Plaintiff's brother with Florida; and (iii) he disclosed the discrepancy to the SDSO. Whether or not the physical discrepancy was significant, and whether or not Agent Gregory told the SDSO of the discrepancy is in dispute. Hence there is a material issue of fact that the precludes summary judgment for this reason.

2. Plaintiff fails to state a cognizable constitutional violation because his arrest was made pursuant to a valid arrest warrant.

Second, Agent Gregory argues there was no constitutional violation because the facially valid arrest warrant established probable cause, and therefore there was no

Fourth Amendment violation. In support of his position, Agent Gregory cites to *Baker v. McCollan*, 443 U.S. 137 (1979), which held that the execution of a facially valid arrest warrant does not give rise to a constitutional violation even if the person named in the warrant is not the person whom the authorities intended to arrest.

Plaintiff argues that the holding in *Baker* is distinguishable from the present facts because the issue is *Baker* was whether "simple negligence" states a claim for relief under 42 U.S.C. § 1983. *Id.* at 139. Plaintiff avers that this is not a case of simple negligence; rather, the claim is that Agent Gregory procured Plaintiff's arrest knowing that he was not the man named in the Florida warrant in order to gather information on Plaintiff's brother. Plaintiff cites to *Brown v. Byer*, 870 F.2d 975, 979 (5th Cir. 1989) which held that knowingly arresting the wrong person under a facially valid warrant does constitute a constitutional violation. Agent Gregory replies by arguing that Plaintiff has failed to make a substantial showing that Agent Gregory "knew" Plaintiff was not the man named in the warrant, and that Agent Gregory has testified at deposition to this effect. Whether Agent Gregory knew plaintiff was the person in the Florida warrant is an issue for the finder of fact, making summary judgment inappropriate.

3. No clearly established law would have provided notice that Agent Gregory's actions were clearly unlawful

Last, Agent Gregory argues there was no clearly established law that: (i) prohibited Agent Gregory from passing a valid arrest warrant to the SDSO; and (ii) required him to investigate further. Yet Plaintiff argues that there is clearly established law that knowingly arresting the wrong person does constitute a constitutional violation. As Plaintiff points out, this Court has already determined in the Order denying Agent Gregory's motion to dismiss, that if proven, Agent Gregory's conduct would

constitute a violation of Plaintiff's Fourth Amendment rights.

Agent Gregory replies by arguing that under an objective view of the facts, a reasonable officer could have concluded that the arrest applied to Plaintiff, and thus it was not unlawful to pass the warrant to the SDSO. Reply at 9. Yet, Agent Gregory has not addressed the law relating to knowingly arresting the wrong person. Because this is an issue of material fact, summary judgment is inapplicable.

4. Summary

Agent Gregory states that the pleadings "reveal no genuine dispute but, rather, the parties have each argued differing interpretations of those facts." Reply at 3. The Court does not agree. From the evidence provided by Agent Gregory and Plaintiff, the following facts are clear: (i) Agent Gregory was assigned to follow the "lead" to interview Plaintiff in July of 1999; (ii) Agent Gregory had documentation stating that the fugitive had assumed the identify of Plaintiff, including date of birth and social security number; (iii) the Florida arrest warrant described the fugitive as 6 feet tall and 200 pounds; (iv) Plaintiff was described as 6 feet 3 inches tall, and 270 pounds; (v) Agent Gregory called Florida requesting the outstanding arrest warrant; (vi) Agent Gregory called the SDSO and informed them of the existence of the Florida arrest warrant; and (viii) Agent Gregory appeared 15-20 minutes after Plaintiff was arrested.

There appears to be a genuine issue of material fact regarding: (i) whether Agent Gregory informed the SDSO of the physical discrepancy; (ii) whether Agent Gregory informed the SDSO that Plaintiff's brother used Plaintiff's information as an alias; and (iii) whether a discrepancy of over 30 pounds was significant. In essence, Agent Gregory argues he reasonably, although mistakenly, believed that

the person named in Florida arrest warrant was Plaintiff. Plaintiff argues that Defendant knew the person named in the warrant was not Plaintiff, but that Agent Gregory procured Plaintiff's arrest for the purpose of pressuring Plaintiff to provide information on his brother. This is a factual dispute that is to be determined by a finder of fact, and not appropriate for summary judgment. Therefore, the Court **DENIES** Agent Gregory's motion for summary judgment.

C. Defendant United States of America Motion for Summary Judgment

Plaintiff's remaining causes of action against Defendant are: (1) False Arrest and Imprisonment; (2) Malicious Prosecution; (3) Abuse of Process; (4) Battery; (5) Intentional Infliction of Emotional Distress; (6) Negligence; and (7) Negligent Infliction of Emotional Distress. Defendant moves for summary judgment on all seven causes of action will be analyzed separately.

1. False Arrest and Imprisonment

Defendant argues that because the SDSO, and not Agent Gregory, arrested Plaintiff, there was no federal employee involved and therefore the claim is meritless. Citing *Arnsberg v. United States*, 757 F.2d 971 (9th Cir. 1984), Defendant contends that an arrest pursuant to valid warrant protects the officer and, consequently, the United States from liability for damages on a theory of false arrest or imprisonment. *Arnsberg*, however, is clearly distinguishable from the present facts, because the *Arnsberg* court specifically noted that the agents "acted nearly perfectly." *Id.* at 980. In this case, Plaintiff argues that Agent Gregory acted with malice, as defined in *Ting v. United States*, 927 F.2d 1504 (9th Cir. 1991) (malice refers not "to the actual physical execution of the warrant, but to the officer's state of mind in procuring or executing the warrant.") Defendant replies by arguing that the record does not support a

genuine issue of fact. The Court does not agree. Plaintiff has provided evidence that would lead to a reasonable inference that Agent Gregory knew Plaintiff was not the subject of the Florida arrest warrant, but nonetheless procured his arrest for the purpose of obtaining information on Plaintiff's brother. Therefore, there is a dispute as to material facts relating to whether Agent Gregory knowingly arrested the wrong person or not. The Court **DENIES** Defendant's motion for summary judgment on this cause of action.

2. Malicious Prosecution

Defendant states that the standard for malicious prosecution is the procurement of arrest under lawful process but for malicious motive and without probable cause. Defendant cites to *Asargi v. City of Los Angeles*, 15 Cal.4th 744, 757 (1997) in support of this standard. Defendant contends that because Agent Gregory believed that Plaintiff was the person named in the Florida arrest warrant, it was objectively reasonable for Agent Gregory to believe that probable cause existed for the arrest, and the arrest was therefore not malicious. Plaintiff avers that the only dispute is whether Agent Gregory acted with the reasonable belief that Plaintiff was the person wanted in the arrest warrant. Citing the same evidence, Plaintiff argues that there is a genuine issue of fact on this issue. The Court agrees, and there **DENIES** Defendant's motion for summary judgment on this claim.

3. Abuse of Process

Abuse of process is the misuse or misapplication of a process justified in itself for an end other than that which it was designed to accomplish. *Lunsford v. Am. Guar. & Liab. Ins., Co.*, 18 F.3d 653, 655 (9th Cir. 1994). Defendant concedes that there is no distinction between abuse of power and malicious prosecution, and sets forth the same argument as the malicious prosecution section. Plaintiff

likewise sets forth the same facts. Having found a genuine issue of fact regarding Agent Gregory's belief, the Court **DENIES** Defendant's motion for summary judgment on this issue.

4. Battery

Defendant contends that battery is the "unlawful, harmful or offensive contact with the person of another," *citing In re Baldwin*, 249 F.3d 912, 918 (9th Cir. 2001). Defendant argues that because Agent Gregory never physically contacted Plaintiff, this claim cannot stand. Plaintiff, on the other hand, states that battery is "the intent to cause imminent apprehension of harmful physical contact with the harmful physical contact resulting therefrom," *citing Rains v. Superior Court*, 150 Cal.App.3d 933, 938 (1984). Plaintiff concedes that Agent Gregory did not personally touch Plaintiff, but alleges that by procuring the arrest, Agent Gregory caused the unlawful contact, i.e. the unlawful arrest, between the SDSO deputies and Plaintiff. Because there is a material issue as to whether Plaintiff was unlawfully arrested, the Court **DENIED** Defendant's motion of summary judgment on this cause of action.

5. Intentional Infliction of Emotional Distress

Defendant asserts the elements of the tort of intentional infliction of emotional distress: (1) extreme and outrageous conduct by the defendant; (2) intention to cause, or reckless disregard of the probability of causing, emotional distress; (3) severe emotional suffering; and (4) actual and proximate causal link between the tortious conduct and the emotional distress. In support of this proposition, Defendant relies on *Molko v. Holy Spirit Assoc. for the Unification of World Christianity*, 46 Cal.3d 1092 (1988). Defendant argues that Plaintiff has failed to demonstrate that Agent Gregory's conduct was so outrageous as to exceed all bounds of decency. Relying on this Court's previous order, Plaintiff states that a false arrest can serve as a basis for a claim of

intentional infliction of emotional distress. Next, Plaintiff argues that he raises a triable issue of outrageous conduct, specifically, if Agent Gregory knowingly had Plaintiff arrested on a warrant he knew was for Robert with the purpose of acquiring information about Plaintiff's brother. The evidence Plaintiff points to is what Agent Gregory told the SDSO, and for what purpose. Plaintiff argues Agent Gregory did not tell the SDSO about Robert because he wanted to keep the SDSO in the dark. Opposition at 17. Agent Gregory claims to have told SDSO about Robert. This is an issue of credibility between Agent Gregory and the SDSO deputies. As such, there is a genuine issue of fact which should be decided by the finder of fact, and hence this claim is not appropriate for a motion for summary judgment. Therefore, the Court **DENIES** Defendant's motion for summary judgment on this claim.

6. Negligence and Negligent Infliction of Emotional Distress.

Plaintiff alleges that Defendant had a duty to Plaintiff to act with ordinary care and prudence so as not to harm or injure another. As a result of Defendant's negligent conduct, Plaintiff contends he suffered emotional distress. Defendant argues that there is no such duty to detect Plaintiff's innocence prior to turning the Florida arrest warrant over to the SDSO. Defendant further argues that a duty arise only when there is a special relationship, which occurs when a citizen relies to his detriment on the officer's conduct. Defendant therefore concludes there was no special relationship between Agent Gregory and Plaintiff, and as such, Plaintiff has not stated a claim for negligence or negligent infliction of emotional distress.

Plaintiff rejects this position, and argues that Gregory had a duty to "use reasonable prudence and diligence to determine whether a party being arrested is the one described in the warrant. The officer may not refuse to act upon information offered him which discloses the warrant is

being served on the wrong person." Plaintiff supports this contention by citing *Lopez v. City of Oxnard*, 107 Cal.App.3d 1, 7 (1989). Additionally, Plaintiff states that this duty was created by California Civil Code section 43.55, which requires all peace officers to act "without malice and in the reasonable belief that the person arrested is the one referred to in the warrant." Defendant counters this by arguing that since Agent Gregory never arrested Plaintiff, reliance on California Civil Code section 43.55 is misplaced. The Court does not agree. Defendant relies on *Guccione v. United States*, 847 F.2d 1031, 1037 (2d Cir. 1988), which holds that the FBI owes no general duty in conduct of undercover operations, absent custody or other affirmative undertaking on which plaintiff justifiably relies. This case is distinguishable because *Guccione* was decided in the context of 28 U.S.C. § 2680(h), known as the intentional tort exception, where Guccione was the subject of an undercover investigation. The court held that the agents did not have an affirmative duty to protect Guccione apart from its duty to supervise its employees. But the court clearly stated that "all citizens, of course, have the right to expect that the Government's agents will not cause deliberate harm to innocent persons." *Id.*, 847 F.2d at 1037. The Court find that Agent Gregory did owe Plaintiff a duty to not cause deliberate harm to an innocent person, and whether Gregory breached that duty is a question for the finder of fact. As such, the Court **DENIES** Defendant's motion for summary judgment on these causes of action.

D. Defendant's Motion to Strike

Defendant moves the court to strike from Plaintiff's complaint all demands for punitive damages. Defendant argues that the United States is not liable for punitive damages in Federal Tort Claim Act ("FTCA") claims. Motion at 14-15. Plaintiff does not address this motion, therefore the Court assumes this motion is unopposed.

1. Legal Standard

Federal Rule of Civil Procedure 12(f) provides that "the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). A party may move to strike any part of the prayer for relief "when the damages sought are not recoverable as a matter of law." *Bureerong v. Uvawas*, 922 F. Supp. 1450, 1479 n.34 (C.D. Cal. 1996) (citing *Tapely v. Lockwood Green Engineers, Inc.*, 502 F.2d 559, 560 (8th Cir. 1974) (per curiam)).

2. Discussion

Defendant correctly states that under the FTCA, the United States "shall not be liable . . . for punitive damages." 28 U.S.C. § 2674. This was confirmed in *Nurse v. United States*, 226 F.3d 996, 1005 (9th Cir. 2000). Because the damages sought are not recoverable as a matter of law, the Court **GRANTS** Defendant's motion to strike.

III. Conclusion

For the foregoing reasons, Agent Gregory's motion for summary judgment is **DENIED**; Defendant United States of America's motion for summary judgment is **DENIED**; Defendant United States of America's motion to strike is **GRANTED**.

IT IS SO ORDERED.

10/11/02
Date

/s/ Judith N. Keep
Judge Judith N. Keep
United States District Court
Southern District of California

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JULIAN C. LEE, AN INDIVIDUAL,
PLAINTIFF,

VS.

JAKE GREGORY, UNITED STATES OF AMERICA,
AND DOES 1 THROUGH 10, INCLUSIVE,
DEFENDANT,

CASE NO. 01CV0739K RBB

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Filed October 3, 2001.

On August 8, 2001, Defendants, proceeding through counsel, filed a motion to dismiss Plaintiff's complaint, or in the alternative, for summary judgment. On September 7, 2001, Plaintiff, proceeding through counsel, filed an opposition.

I. Background

A. Plaintiff's Complaint

In his complaint, Plaintiff alleges the following facts: Plaintiff was born on March 7, 1967. Plaintiff has a military

background and no criminal history or record. Plaintiff has a brother named Robert Lee, a fugitive wanted on robbery and assault charges in New Jersey dating from 1994. Robert Lee is estranged from his family and has not had any contact with any of them for a number of years. Robert has adopted many aliases over the past few years, including using the name and social security number of his brother, Plaintiff Julian Christopher Lee. Plaintiff alleges that the FBI was aware of this and routinely checked with Plaintiff's parents to determine whether Robert had been in contact with them.

According to the complaint, in late 1998, Defendant Jake Gregory, an FBI agent, contacted Plaintiff's old roommate Grace Kessler and ex-girlfriend Jana Dubraveak. Gregory allegedly told them that his inquiry concerned Plaintiff's brother, not Plaintiff. They both told Gregory that they did not know how to contact Plaintiff.

In April of 2000, Gregory contacted another old roommate of Plaintiff's, J.B., and asked him to come to Gregory's Carlsbad office to answer some questions. At the office, Gregory showed J.B. a photo of Robert Lee, and J.B. told Agent Gregory that he had never seen Robert Lee before. On April 28, 2000, Agent Gregory came to Plaintiff's house in Encinitas, California while Plaintiff was at work. Gregory spoke to Plaintiff's girlfriend's brother, Brian Ingraham. Gregory told Ingraham that his inquiry involved Plaintiff's brother, not Plaintiff, and left his business card and a note for Plaintiff to contact him.

Upon receiving the note, Plaintiff called Gregory back the same day. Plaintiff claims that he told Gregory that he had no idea where his brother was and that he had not spoken to him in a number of years. Plaintiff also demanded that Gregory stop following him and harassing his friends and acquaintances as neither he nor they knew the location of Robert Lee. Plaintiff then hung up the phone.

The following week, on May 4, 2000, a San Diego County Sheriff's Deputy was in Plaintiff's neighborhood questioning his neighbor about Plaintiff and his brother Robert. Later on the same day, Plaintiff's girlfriend, Sarah, saw a sheriff's car parked on the street and spoke with the deputy in the car, Marco Garmo. Deputy Garmo informed her that he was working for the FBI on the case involving Robert Lee and that there was an outstanding warrant for his arrest from Florida. Sarah explained to Deputy Garmo that the FBI had been looking for Robert Lee for years and that all she knew about Robert was the he was estranged from the Lee family. Plaintiff's girlfriend called him immediately and Plaintiff then called Deputy Garmo on Garmo's cellular phone, and explained to him that he had not spoken to his brother in years and did not know where he was.

Later that night, Plaintiff went to the supermarket. As he pulled into the parking lot, he was surrounded by several sheriff's cars and was ordered out of his car at gunpoint by the sheriffs, including Sheriff's Deputy Garmo. The officers told Plaintiff he was being arrested on the Florida warrant. The Florida warrant had been issued in Plaintiff's name and social security number ("SSN"), though some of the physical characteristics did not match (e.g. there was a significant difference between the weight of the person wanted in Florida [200 lbs.] and Plaintiff's weight [284 lbs.]). The officers handcuffed Plaintiff, placed him under arrest, and took him to the Encinitas Sheriff's Station.

Upon Plaintiff's arrival at the station, still handcuffed, he was placed in a room with FBI Agent Gregory. Plaintiff alleges that Gregory demanded that Plaintiff give him information on his brother, and that he said he would be able to clear up the "Florida situation" if Plaintiff gave him information on his brother. Complaint ¶ 23. Plaintiff claims that he told Gregory that he did not know where his brother was and that he had not heard from him or spoken to him in

years, after which Gregory allegedly replied "Have a nice trip to Florida" and walked out of the room. *Id.*

Plaintiff remained in jail four days until he was able to post bail on May 8, 2000. Also on May 8, 2000, extradition papers were filed to begin Plaintiff's extradition to Dade County, Florida. On May 9, 2000, Plaintiff was formally charged under the California Penal Code § 1551.1 with being a fugitive from justice. Shortly thereafter, Plaintiff's friends were able to hire an attorney who contacted the San Diego District Attorney's Office to inform them of Plaintiff's identity and his brother's history. Shortly after these events, Plaintiff was freed and his extradition case was dismissed by the San Diego District Attorney.

B. Defendants' Story

In support of their motion for summary judgment, Defendants submit a sworn affidavit by Agent Gregory, selected FBI "Bulletins," a copy of the Florida warrant, and a letter from the Gloucester County, New Jersey Prosecutor's Office.[1] The following are the facts related by the Defendants: the FBI became involved in investigating the unlawful flight of Robert Lee, Plaintiff's brother, based on robbery and aggravated assault charges dating back to 1994. On or about August 13, 1998, the San Diego FBI received a request to locate and interview the fugitive's brother, Julian Christopher Lee in order to inquire about Robert Lee's whereabouts. An agent spoke to Plaintiff's ex-girlfriend and roommate, neither of whom knew how to contact Plaintiff.

---

[1] Plaintiff objects to Defendants' submission of the documents as "uncertified, unauthenticated copies of documents that purport to be FBI bulletins of some kind." Plaintiff's Opposition at 13. Plaintiff also states that the documents submitted are selective, and inappropriate as counsel for Defendants has refused to allow any discovery pending resolution of the instant motion. *Id.* at 13-15.

In July of 1999, the San Diego FBI received a second request to follow up on leads on the whereabouts of Robert Lee. The request listed the names and social security numbers of Keith Lee, Willmar Lee, Plaintiff (as "Christopher Lee") and Robert McMullen as possible aliases for Robert Lee (the other aliases were Robert Lee's older brothers' and his cousin's identities). The request listed two addresses for Christopher Lee, one in Miami, Florida and the other in Encinitas, California. The request also stated that "Christopher Lee" was wanted on a Florida warrant for assault, and that the social security number listed on that individual was the same as that of the Christopher Lee living in Encinitas, California. The request also contained an attachment from the New Jersey prosecutor's office that stated that as of 1997, Robert Lee was known to be using the name "Christopher Lee."

Agent Gregory was assigned to check on the "lead." Gregory went to Plaintiff's house in Encinitas, determined that Plaintiff was not home, and left a card with an individual with the message that Agent Gregory wished to speak to Plaintiff about his brother. Defendants claim that Plaintiff telephoned Agent Gregory, indicated that he did not wish to speak to the FBI, accused the FBI of harassing his friends and hung up.

Defendants claim that Agent Gregory was aware that there was an arrest warrant from Miami for "Christopher Lee" with the same date of birth and SSN as the individual that Gregory had been speaking to in Encinitas. Defendants claim that after Plaintiff refused to speak to Agent Gregory, Gregory believed it was possible that Plaintiff was uncooperative because he knew of the Miami warrant or, possibly that Plaintiff was actually the fugitive Robert Lee. Gregory called the police in Miami and determined that the arrest warrant was for Christopher Lee, that it was current, and that the Miami police were willing to extradite Christopher Lee from anywhere. As California law does

not allow federal agents to execute non-federal warrants, Agent Gregory passed on the information about the Miami warrant to the San Diego County Sheriff's Office, and indicated to his directing office in Sacramento that it was his intention to forego any further investigation as it appeared unlikely that Plaintiff would provide any information about his brother.

However, on May 4, 2000, after the San Diego Sheriffs had arrested Plaintiff and brought him in to the station, Gregory went to the Encinitas Station to determine whether Plaintiff had any information about his brother. Plaintiff denied any form of contact with his brother for several years. Defendants claim that Agent Gregory informed Plaintiff that if he assisted in locating his brother Robert, it might help Plaintiff's "Florida situation," but they deny that any promises were made.

C. Procedural History

On April 26, 2001, Plaintiff filed his initial complaint. On July 2, 2001, Plaintiff filed his first amended complaint naming Agent Jacob Gregory and the United States as defendants. On August 8, 2001, Defendants filed the instant motion to dismiss.

II. Discussion

A. Standard of Review

(i) Motion to Dismiss

Federal Rule of Civil Procedure 12(b)(6) allows a court to dismiss a complaint for failure to state a claim upon which relief can be granted. Such a dismissal can be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *See Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988). Under Rule 12(b)(6), a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff could prove no set of facts in support of his or her claim for relief. *See Levine v. Dia-*

manthuset, Inc., 950 F.2d 1478, 1482 (9th Cir. 1991). In applying this standard, the court must treat all of plaintiff's factual allegations as true. *See Experimental Eng'g. Inc. v. United Technologies Corp.*, 614 F.2d 1244, 1245 (9th Cir. 1980). On a Rule 12(b)(6) motion, the court assumes that all general allegations "embrace whatever specific facts might be necessary to support them." *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 521 (9th Cir. 1994), *cert. denied*, 515 U.S. 1173 (1995). However, the court does not have to accept as true conclusory allegations that contradict facts which may be judicially noticed or which are contradicted by documents referred to in the complaint. *See, e.g., Steckman v. Hart Brewing Inc.*, 143 F.3d 1293, 1295-1296 (9th Cir. 1998). The court, likewise, is not bound to assume the truth of legal conclusions simply because they are stated in the form of factual allegations. *See, Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981), *cert. denied*, 454 U.S. 1031 (1981). To dismiss with prejudice, it must appear to a certainty that the plaintiff would not be entitled to relief under any set of facts that could be proven. *See Reddy v. Litton Indus.*, 912 F.2d 291, 293 (9th Cir. 1990), *cert. denied*, 502 U.s. 921 (1991).

(ii) Motion for Summary Judgment

Federal Rule of Civil Procedure 56(c) provides that summary judgment is appropriate if there is no genuine issue as to any material fact, and the moving party is entitled to a judgment as a matter of law. Where the plaintiff bears the burden of proof at trial, summary judgment for the defendant is appropriate if the defendant shows that there is an absence of evidence to support the plaintiff's claims. *See Celotex Corp. v. Catrett*, 477 US 317, 325 (1986); *see also Garneau v. City of Seattle*, 147 F.3d 802, 807 (9th Cir. 1998). The movant has the initial burden of demonstrating that summary judgment is proper. *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 157 (1970). The burden then shifts to the nonmovant to show that summary judgment is not appro-

priate. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). To make such a showing, the nonmovant must go beyond the pleadings to designate *specific facts* showing that there is a genuine issue for trial. *See id.* However, in considering this motion, the evidence of the nonmovant is to be believed and all justifiable inferences are to be drawn in his or her favor. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 255 (1986). Courts should be careful not to let a motion for summary judgment become a "trial on affidavits." *Id.* Determinations regarding credibility, the weighing of evidence, and the drawing of legitimate inferences are jury functions, not appropriate for resolution by the court in a motion for summary judgment. *See id.* at 255.

B. Analysis

Plaintiff's complaint makes eleven claims for relief: 1) a *Bivens* claim against Gregory; 2) violations of the California Civil Rights Act, Cal. Civ. Code § 51 against all Defendants; 3) false arrest/imprisonment against all Defendants; 4) malicious prosecution against all Defendants; 5) abuse of process against all Defendants; 6) battery against all Defendants; 7) intentional infliction of emotional distress against all Defendants; 8) negligence against all Defendants; 9) negligent infliction of emotional distress against all Defendants; 10) negligent supervision and training against the United States; and 11) negligent hiring and retention against the United States. All claims against the United States are brought pursuant to the Federal Tort Claims Act ("FTCA").

Defendant brings this motion to dismiss for the following reasons: 1) Plaintiff's common law tort claims against the United States are barred by the "discretionary function" exemption of the FTCA; 2) Plaintiff's common law torts are without merit; 3) Plaintiff has not stated a claim of discrimination under the California Civil Rights Act; and 4) Agent Gregory is entitled to qualified immunity.

As an initial matter, the court notes that Defendants have filed the instant motion seeking to have some claims dismissed under the motion to dismiss standard pursuant to Rule 12(b) and some claims dismissed under the summary judgment standard pursuant to Rule 56(c). Specifically, Defendant seeks to 1) dismiss *Bivens* claims against Agent Gregory based on qualified immunity pursuant to both Rule 12(b) and 56(c); 2) dismiss claims against the United States under the discretionary function exception of the FTCA pursuant to Rule 12(b) only; 3) dismiss Plaintiff's common law tort claims as without merit pursuant to both Rule 12(b) and 56(c); and 4) dismiss the California Civil Rights Act claims pursuant to Rule 12(b) only.

The complaint in this case was filed on April 26, 2001, and, to date, there has been no discovery conducted. As explained herein, the court finds that Defendants' motion for summary judgment are inappropriate at this stage of the litigation. In this motion for summary judgment, once Defendants show an absence of evidence to support Plaintiff's claim, the burden shifts to the Plaintiff to show particularized facts to rebut Defendants' motion for summary judgment, and yet, up to this time, Defendants have refused to provide any discovery, including interrogatories or depositions from Agent Gregory. Not only does this place an unfair burden on Plaintiff, it makes it very difficult for the court to get to the merits of many of Defendants' arguments, which require an analysis of the facts and circumstances surrounding Gregory's role in Plaintiff's arrest.

(i) Qualified Immunity

1. Applicable Law

First, Defendants claim that claims against Agent Gregory should be dismissed because he is entitled to qualified immunity. Claims of qualified immunity require a two step analysis. As a threshold matter, the court must consider whether the facts alleged, taken in the light most favor-

able to the party asserting the injury, show that the officer's conduct violated a constitutional right. *Saucier v. Katz*, 533 U.S. _, 121 S.Ct. 2151, 2156 (2001). If the allegations do not establish the violation of a constitutional right, "there is no necessity for further inquiries concerning qualified immunity." *Id.* at 2153 (citing *Wilson v. Layne*, 526 U.S. 603, 615 (1999)). If an officer makes a reasonable mistake as to what the law requires, the officer is entitled to immunity. *Id.* at 2157.

Having identified the specific right at issue, the court must turn to whether that right was clearly established at the time the prosecutors allegedly interfered with that right. *See Anderson v. Creighton*, 483 U.S. 635, 640 (9th Cir. 1991) (citing *Todd v. United States*, 849 F.2d 365, 368-69 (9th Cir. 1988)). The plaintiff bears the burden of showing that the right allegedly violated was clearly established. *See Collins v. Jordan*, 110 F.3d 1363, 1369 (9th Cir. 1996).

A right is clearly established "[i]f the only reasonable conclusion from binding authority [was] that the disputed right existed." *Blueford v. Prunty*, 108 F.3d 251, 255 (9th Cir. 1997). "The contours of the right must be sufficiently clear that [at the time the allegedly unlawful action is taken] a reasonable official would understand that what he is doing violates that right." *Mendoza v. Block*, 27 F.3d 1357, 1361 (9th Cir. 1994) (quoting *Anderson*, 483 U.S. at 640). For a right to be clearly established, "the very action in question" need not "ha[ve] previously been held unlawful;" instead, the "unlawfulness must be apparent" in light of pre-existing law. *Anderson*, 483 U.S. at 640. "Thus, when the defendants' conduct is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts that the action was unconstitutional, closely analogous pre-existing case law is not required to show that the law is clearly established." *Mendoza*, 27 F.3d at 1361 (quoting *Casteel v. Pieschek*, 3 F.3d 1050, 1053 (7th Cir. 1993)); *see Backlund v. Barnhart*, 778 F.2d 1386, 1390 (9th

Cir. 1985) ("Certainly . . . [§ 1983 plaintiffs] need not always produce binding precedent. . . . There may be cases of conduct so egregious that any reasonable person would have recognized a constitutional violation.").

Plaintiff argues that at the time of Plaintiff's arrest, it was clearly established law that the knowing arrest of a person who is not the person described in the warrant is a violation of the Fourth Amendment. Plaintiff argues that the analysis focuses on whether a "reasonable officer could have believed could have believed that probably cause existed to arrest" Plaintiff. *Hunter v. Bryant*, 502 U.S. 224 (1991). This is an objective analysis, focused on a reasonable officer confronted with the facts and circumstances actually known to the defendant officer. *Act Up!/Portland v. Bagley*, 988 F.2d 868, 873 (9th Cir. 1993). Plaintiff further argues that it has been clearly established that a valid arrest under a warrant may only occur if the arresting officers reasonably believe the arrestee is the person sought in the warrant, citing to *Hill v. California*, 401 U.S. 797 (1971). In *Hill*, the Supreme Court found that "sufficient probability" is the touchstone of reasonableness under the Fourth Amendment. *Id.* at 804.

After an analysis of the applicable law, the court finds that the Plaintiff has sufficiently demonstrated that Agent Gregory may face § 1983/*Bivens* liability "for executing a warrant in an unreasonable manner," *see Bergquist v. County of Cochise*, 806 F.2d 1364, 1369 (9th Cir. 1986) (overturned on other grounds by *City of Canton v. Harris*, 489 U.S. 378 (1989)), and specifically for the arrest of a person with a warrant when the officer believes that the person is not the one named in warrant. Accordingly, the relevant question for the court is: Would a reasonable officer confronted with the facts and circumstances actually known to Agent Gregory have determined that there was a sufficient probability that Plaintiff was the person named in the Florida arrest warrant?

The court now looks at the allegations, taken in the light most favorable to Plaintiff, to consider whether they show that Agent Gregory violated Plaintiff's Fourth Amendment rights. Plaintiff alleges that the FBI and Agent Gregory were aware that Plaintiff's brother used a number of aliases, including assuming Plaintiff's identity. Plaintiff also alleges that the FBI was aware of Robert Lee's estrangement with the Lee family, and that Gregory questioned a number of witnesses who corroborated that fact. Plaintiff further alleges Gregory interviewed his former roommate, who confirmed by photo identification that Robert Lee was not the Christopher Lee that he knew in Encinitas. Plaintiff alleges that he contacted Gregory at Gregory's request, told him that he did not know the whereabouts of his brother, demanded that Gregory stop harassing him and his friends, and hung up on Gregory. Plaintiff alleges Gregory then secured the Florida warrant, and supplied it to the San Diego Sheriff's Department for the purpose of arresting Plaintiff. Plaintiff further alleges that Agent Gregory was at the Sheriff's Station to question him about his brother, promising Plaintiff to clear up the "Florida situation" if Plaintiff cooperated. When Plaintiff repeated that he did not know the whereabouts of his brother, he alleges that Gregory led Plaintiff to be jailed and extradited, even with the knowledge that the Florida warrant was not for Plaintiff.

Taking these facts as alleged, in the light most favorable to the Plaintiff, the court finds that Gregory's conduct would constitute a violation of Plaintiff's Fourth Amendment rights. *See Saucier*, 121 S.Ct. at 2156. Accordingly, the court denies Defendants' motion to dismiss claims against Agent Gregory based on qualified immunity.

2. Qualified Immunity on Motion for Summary Judgment

Defendants also request that the court grant summary judgment to Gregory based on qualified immunity. The

Supreme Court has held that because qualified immunity entitles government officials to "an immunity from suit rather than a mere defense to liability," *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985), it is essential that "insubstantial claims" be resolved as quickly as possible. *Anderson v. Creighton*, 483 U.S. 635 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982); *Saucier*, 533 U.S. __, 121 S.Ct. 2151, 2156 ("Qualified immunity is an 'entitlement not to stand trial or face the other burdens of litigation.'") (citation omitted).

Nonetheless, while qualified immunity is usually to be determined "at the earliest possible point in the litigation," *Act Up!/Portland v. Bagley*, 988 F.2d 868, 873 (9th Cir. 1993); *Liston v. County of Riverside*, 120 F.3d 965, 975 (9th Cir. 1997); *Saucier*, 533 U.S. __, 121 S.Ct. at 2155-56, a court order granting summary judgment in favor of moving defendants is inappropriate where a genuine issue of material fact prevents a determination of qualified immunity until after trial on the merits. *See Act Up!/Portland*, 988 F.3d at 873; *Sloman v. Tadlock*, 21 F.3d 1462, 1467-68 (9th Cir. 1994); *Thorsted v. Kelly*, 858 F.2d 571, 575 (9th Cir. 1998) (citing cases finding that qualified immunity from damages may be asserted at trial); *see also County of Sacramento v. Lewis*, 523 U.S. 833, 841 n. 5 (1998) ("[T]he better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all.").

In support of their motion, the Defendants submits certain documents from the FBI and an affidavit from Agent Gregory. However, the Defendants are requesting summary judgment in the absence of any discovery, solely on the basis of documents and affidavits Defendants have chosen. The court finds that this motion is premature. Having cleared the hurdle of showing that on the basis of Plaintiff's allegations, viewed in the light most favorable to Plaintiff, Gregory's conduct violated clearly established law,

Plaintiff deserves an opportunity to engage in discovery. Accordingly, the court finds that Defendants' motion for summary judgment based on qualified immunity is premature. After both sides have had an opportunity to engage in appropriate discovery, Defendants may resubmit their motion for summary judgment based on qualified immunity.

(ii) Discretionary Function Exemption

Defendants argue that Plaintiff's claims against the United States should be dismissed because the court lacks jurisdiction over them under the FTCA, because Agent Gregory's action fall under the "discretionary function" exception of the FTCA.

Suits against the United States and its agencies are barred by sovereign immunity unless permitted by an explicit waiver of immunity from suit. *See FDIC v. Meyer*, 510 U.S. 471 (1994). Congress waived the United States' immunity from suits for money damages for traditional tort claims when it passed the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671-2680, which provides that "[t]he United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. This broad waiver of immunity is subject to various limitations.

Only one exception is at issue in this case—the "discretionary function" exception codified at 28 U.S.C. § 2680(a). That section provides that the FTCA's provisions shall not apply to:

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part

> of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a). The discretionary function exception is designed to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic and political policy through the medium of an action in tort." *United States v. Gaubert*, 499 U.S. 315, 323 (1991). The Supreme Court has also admonished that "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case." *United States v. Varig Airlines*, 467 U.S. 797, 813 (1984).

To determine whether the discretionary function exception is applicable, courts typically determine first whether the challenged action involves an element of choice of judgment. *See United States v. Berkovitz*, 486 U.S. 531, 536 (1988). The exception does not apply when "a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow." *Id.* Second, assuming an action does involve an element of choice or judgment, courts must decide whether that choice or judgment is of the type that Congress intended the discretionary function exception to shield. *Id.* Only those exercises of judgment which involve considerations of social, economic, and political policy are excepted from the FTCA by the discretionary function doctrine. *See Varig Airlines*, 467 U.S. at 814. The United States has the burden of proving that the discretionary function exception applies. *See Prescott v. United States*, 973 F.2d 696, 702 (9th Cir. 1992). In cases in which the exception does apply, the court lacks subject matter jurisdiction over the action. *See Lesoeur v. United States*, 21 F.3d 965, 967 (9th Cir. 1994); *Sabow v. United States*, 93 F.3d 1445, 1451 (9th Cir. 1996).

Defendant argues that the court's analysis is objective, focusing on the nature of the actions taken and whether

they are susceptible to policy analysis, rather than subjective, based on the agent's intent in exercising the discretion conferred by statute or regulation. *Lesoeur*, 21 F.3d at 967-68. Relying primarily on a case from the Third Circuit, the Defendants argue that investigative acts of an agent are by definition ground in policy consideration. *Pooler v. United States*, 787 F.2d 868, 871 (3rd Cir. 1986); see also *Sabow*, 93 F.3d at 1454 (finding that the discretionary function exception covered an FTCA claim arising from a negligent investigation by the Naval Investigative Service and Judge Advocate General into the apparent suicide of a Marine Corp officer). The Defendants specifically argue that the discretionary function exception has been held to bar claims against the United States in cases of mistaken arrest. *See Rourke v. United States*, 744 F.Supp. 100 (E.D. Pa 1989); *Mesa v. United States*, 837 F.Supp. 1210 (S.D. Fla. 1993). Defendant argues that because all of Agent Gregory's actions with respect to Plaintiff were based on his investigation of a wanted fugitive, the discretionary function exception bars all claims against the United States.

However, as Plaintiff points out, the Ninth Circuit (as well as other Circuits) has not adopted a blanket use of the discretionary function exemption to any aspect of an agent's investigation, as Defendants suggest has been adopted in certain other Circuits. The Ninth Circuit has found that:

> Government action is discretionary if the action is of the nature and quality that Congress intended to shield from tort liability. Congress wished to prevent judicial 'second guessing' of legislative and administrative decisions ground in social, economic, and political policy through the medium of an action in tort.
>
> While law enforcement involves exercise of a certain amount of discretion on the part of individual officers, such decisions do not involve the sort of generalized

> social, economic and political policy choices that Congress intended to exempt from tort liability. *See Caban v. United States*, 671 F.2d 1230 (2d Cir. 1982) (INS decision whether to detain alien based on alien's appearance and ability to answer questions about his homeland not a discretionary function under FTCA).

Garcia v. United States, 826 F.2d 806, 809 (9th Cir. 1987).

For example, in *Patel v. United States*, the court found that while some actions taken by officers in the course of serving a search warrant involve matters of judgment or choice, not all of those decisions are based on consideration rooted in economic, social or political policy. 806 F.Supp. 873, 878 (N.D.Cal. 1992). In general, governmental conduct cannot be discretionary if it violates a legal mandate. *See United States Fidelity & Guaranty Co. v. United States*, 837 F.2d 116, 120 (3d Cir.) *cert. denied*, 487 U.S. 1235, 108 S.Ct. 2902, 101 L.Ed.2d 935 (1988). The Ninth Circuit has specifically held that the constitution may limit the discretion of federal officials such that the discretionary function exception to waiver of the United States' sovereign immunity under the FTCA will not apply. *Nurse v. United States*, 226 F.3d 996 (9th Cir. 2000) (officials do not have discretion to create unconstitutional policies). As the court has already found that the alleged facts, viewed in the light most favorable to Plaintiff, Gregory's conduct violated clearly established constitutional law, at this stage of the proceedings, the court finds that Plaintiff's claim is not barred by the discretionary function exception to the FTCA. Accordingly, the court will not bar all claims against the United States based on the discretionary function exception.

Defendants also argue that Claims 10 and 11, for negligent supervision and training and negligent hiring and retention, are barred by the discretionary function exception. Plaintiff does not oppose the dismissal of these two claims. Decisions relating to hiring, training and super-

vision of employees involved policy judgments of the type that Congress intended to be shielded by the discretionary function exception. *Vickers v. United States*, 228 F.3d 944, 950 (9th Cir. 2000). The court therefore grants Defendants' motion to dismiss Claims 11 and 12 with prejudice.

Accordingly, the court grants Defendants' motion to dismiss Claims 11 and 12 with prejudice. The court further denies Defendants' motion to dismiss Claims 1 through 10 against the United States under the discretionary function exception to the FTCA.

(iii) Tort Claims

1. Failure to State a Claim because Agent Gregory did not Perform Arrest

Defendant argues that Plaintiff's claims for false arrest/imprisonment and battery fail to state a claim because it was the San Diego Sheriff's Department, not Agent Gregory who effectuated Plaintiff's arrest. The court does not agree. According to applicable California law,

> There shall be no liability on the part of, and no cause of action shall arise against, any peace officer who makes an arrest pursuant to a warrant of arrest regular upon its face if the peace officer in making the arrest acts without malice and in the *reasonable belief* that the person arrested is the one referred to in the warrant.

California Civil Code § 43.55 (emphasis added); *see also Ting v. United States*, 927 F.2d 1504, 1514 (9th Cir. 1991).

In *Ting*, the Ninth Circuit found that "malice," as that term is used in § 43.55, refers "not to the actual physical execution of the warrant, but to the officer's state of mind in *procuring* or *executing* the warrant." *Id.* (emphasis added).

> For instance, malice for purposes of § 43.55 has been found in situations where the officer purposefully withheld exculpatory evidence from the magistrate issuing the arrest warrant, *Laible v. Superior Court*,

157 Cal.App.3d 44, 53, 203 Cal.Rptr. 513, 518 (1984), where the officer knowingly used false information in order to obtain the warrant, *McKay v. County of San Diego*, 111 Cal.App.3d 251, 255-56, 168 Cal.Rptr. 442, 444-45 (1980), or where the officer executes the warrant with knowledge that it has been recalled or is no longer valid. *Milliken v. City of South Pasadena*, 96 Cal.App.3d 834, 842, 158 Cal.Rptr. 409, 413 (1979).

Id. In the instant case, while Plaintiff admits that Agent Gregory did not personally arrest Plaintiff, Plaintiff alleges that Gregory worked with the San Diego Sheriffs and directed them to arrest Plaintiff with a warrant that Agent Gregory knew was for another person. The court finds that an officer may equally be held liable where an officer procures an arrest warrant from a foreign jurisdiction for the purposes of having a person not really wanted in that warrant falsely arrested to pressure him to provide information, as has been alleged in the instant case. Accordingly, the court denies Defendants' motion to dismiss based on the fact that Agent Gregory did not perform the arrests himself.

2. Failure to State a Claim because Agent Gregory could have Reasonably Believed Plaintiff was the Person Named in the Warrant

Defendants argue that Plaintiff's tort claims for malicious prosecution, abuse of process and negligent infliction of emotional distress should be dismissed both for failure to state a claim and under the summary judgment standard. Defendants argue that even though Plaintiff alleges that Agent Gregory knew Plaintiff was not the subject of the Florida warrant, there is not a "scintilla of evidence" that Gregory knew that Plaintiff was not the individual sought in the Florida warrant or that it was unreasonable to believe that Plaintiff was that individual. Defendants' P&A at 13. Defendants argue that "as it was reasonable for Gregory to

believe that Plaintiff was the person named in the arrest warrant, [Plaintiff's claims] cannot succeed." *Id.*

On a motion to dismiss, a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff could prove no set of facts in support of his or her claim for relief. *See Levine v. Diamanthuset, Inc.*, 950 F.2d 1478, 1481 (9th Cir. 1991). In applying this standard, the court must treat all of plaintiff's factual allegations as true. *See Experimental Eng'g. Inc. v. United Technologies Corp.*, 614 F.2d 1244, 1245 (9th Cir. 1980). On a Rule 12(b)(6) motion, the court assumes that all general allegations "embrace whatever specific facts might be necessary to support them." *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 521 (9th Cir. 19940, *cert. denied*, 515 U.S. 1173 (1995). As the court has previously stated, Plaintiff's allegations, construed in the light most favorable to Plaintiff, support a conclusion that Agent Gregory knew that Plaintiff was not the person named in the warrant, and that he acted to have Plaintiff arrested under that warrant. Accordingly, the court denies Defendants' motion to dismiss based on an alternate theory that Agent Gregory reasonably believed that Plaintiff was the person named in the warrant.

To the extent that the Defendants are requesting that the court analyze Gregory's reasonableness based on the standard set forth for summary judgment, the court declines to do so. As Plaintiff points out, such a determination would require the court to look beyond the complaint at the facts and circumstances surrounding Agent Gregory's role in Plaintiff's arrest. As the court has previously stated, there has not yet been any discovery in this action, and without the benefit of additional facts the court is unable to examine the merits of Defendants' argument. Accordingly, the court denies Defendants' motion for summary judgment in regards to these claims as premature.

3. Failure to State a Claim because there was no Outrageous Conduct by Gregory

Defendant moves to dismiss Plaintiff's claim of intentional infliction of emotional distress because there was no "outrageous conduct" by Agent Gregory, one of the elements of the offense. However, as Plaintiff points out, the Ninth Circuit has held that false arrest may constitute a claim for intentional infliction of emotional distress, stating that if a plaintiff can "prove that the arresting officers arrested them with the intent of inflicting emotional distress [as Plaintiff alleges], [plaintiffs] can assert both false arrest and emotional distress claims." *Gasho v. United States*, 39 F.3d 1420, 1434 (9th Cir. 1994). Accordingly, the court denies Defendants' motion to dismiss based on the alleged lack of "outrageous conduct."

(iv) California Civil Rights Act

Defendants argue that Plaintiff has failed to state a claim under the California Civil Rights Act, Cal Civ. Code § 51 et seq. in Claim 2. The Unruh Civil Rights Act is codified at section 51 *et seq.* of the California Civil Code. Section 51 states: "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color religion, ancestry, national origin, or disability. . ." Cal. Civ. Code § 51. Plaintiff alleges that he is African American, and that Defendants violated his right to be free of any violence committed against him because of his race. Defendant argues that Plaintiff has presented no evidence supporting his claim of discriminatory treatment based on race. Plaintiff does not offer an argument in opposition. After a review of the complaint, the court can find no allegations that support Plaintiff's assertion that Gregory's conduct was motivated by racial discrimination, aside from Plaintiff's conclusory statement that his rights under the Unruh Act were violated. The court is not bound to assume the truth of legal conclusions simply because they are stated in the form of factual allegations. *See Western*

Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981), *cert. denied*, 454 U.S. 1031 (1981). Accordingly, in the absence of any allegations to support Plaintiff's claim under the Unruh Act, the court grants Defendants' motion to dismiss this claim, and dismisses Claim 2 without prejudice. If Plaintiff wishes to restate this claim, he may do so within 30 days of the day this order is stamped "filed."

III. Conclusion

For the foregoing reasons, the court GRANTS IN PART and DENIES IN PART Defendants' motion to dismiss, and accordingly, DISMISSES Claims 10 and 11 with prejudice. The court further DISMISSES Claim 2 without prejudice. Also as stated herein, the court DENIES Defendants' motion for summary judgment as premature. Plaintiff shall have 30 days to reallege Claim 2.

IT IS SO ORDERED.

9/27/01
Date

/s/ Judith N. Keep
Judge Judith N. Keep
United States District Court
Southern District of California

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JULIAN C. LEE,
PLAINTIFF-APPELLEE,

v.

JAKE GREGORY, UNITED STATES OF AMERICA,
DEFENDANTS-APPELLANTS,

AND

THE FEDERAL BUREAU OF INVESTIGATION,
DEFENDANT.

No. 02-57132

D.C. No. CV-01-00739-K/RBB
SOUTHERN DISTRICT OF CALIFORNIA
SAN DIEGO

Filed April 15, 2005

ORDER

Before: NOONAN, THOMAS, and BEA, Circuit Judges.

The panel has unanimously voted to deny the petition for rehearing. Judges Thomas and Bea have voted to deny the petition for rehearing en banc, and Judge Noonan so recommends.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b). The petition for panel rehearing and the petition for rehearing en banc are DENIED.

APPENDIX E

RELEVANT CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const., Amend. IV.

(3)

No. 05-344

In The

Supreme Court of the United States

JAKE GREGORY,

Petitioner,

v.

JULIAN C. LEE,

Respondent.

On Petition For Writ Of *Certiorari*
To The United States Court Of Appeals
For The Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT OF *CERTIORARI*

EUGENE G. IREDALE, ESQ.
LAW OFFICES OF EUGENE G. IREDALE
105 West F Street, 4th Floor
San Diego, California 92101
TEL: (619) 233-1525
FAX: (619) 233-3221

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

(1) Does the Court have jurisdiction?

(2) In deciding the issue of the objective reasonableness of police conduct under the Fourth Amendment, is it appropriate to determine the knowledge of the officer at the time of the questioned conduct?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Jake Gregory was the appellant in the Court of Appeals and a defendant in the district court. Respondent Julian C. Lee was the appellee in the Court of Appeals and the plaintiff in the district court. The United States of America was a defendant in the district court, pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2671, *et seq.*, but is not a party to the petition for a writ of *certiorari*.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

JURISDICTION

Petitioner Gregory has invoked the jurisdiction of this Court under 28 U.S.C. § 1254(1). Respondent believes that the Court of Appeals was without jurisdiction in the first instance under 28 U.S.C. § 1291, and that *Johnson v. Jones*, 515 U.S. 304 (1995) precludes review. This issue is addressed in detail *infra*.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The Court of Appeals correctly applied the proper legal standard under *Graham v. Connor,* 490 U.S. 286, 397 (1989) to the analysis of petitioner Gregory's involvement in the false arrest of respondent Julian Lee. The Court of Appeals analyzed Gregory's asserted qualified immunity defense to liability under *Saucier v. Katz*, 553 U S. 194, 207 (2001). The Court of Appeals asked, in accord with *Saucier,* whether, taken in the light most favorable to the plaintiff, the facts showed that the officer's conduct violated Mr. Lee's constitutional rights. Second, the Court asked if the right violated was clearly established in light of the specific context of the case.

Far from relying on a "subjective" analysis of intent, the Court of Appeals determined that for Fourth Amendment

analysis, Gregory's motives for his conduct were irrelevant. Citing this Court's holding in *Whren*, the Court of Appeals ruled that:

> Gregory is correct that allegations of ulterior motives cannot invalidate police conduct that is justified by probable cause. *Whren v. United States*, 517 U.S. 806, 811-15 (1996). Thus, if Gregory's motive in causing Julian's arrest was to squeeze Julian for information about Robert, *Whren* does render such motive irrelevant. However, Gregory's contention ignores the fact that his conduct must be "objectively reasonable ***in light of the facts and circumstances confronting him without regard for [his] underlying intent or motivation.***" *Graham v. Connor*, 490 U.S. 386, 397 (1989) (emphasis added). Gregory's actions are not impugned because of his motive but because of his claimed knowledge that Julian was not the person named in the Florida arrest warrant.

Pet. App. 7a.

Gregory's complaint, that the Court of Appeals improperly introduces subjective intent into the analysis, is belied by the explicit language of the decision. He confuses the issue of motive or intent with the requisite inquiry into the officer's knowledge at the time of the questioned action, without which the objective reasonableness of the officer's conduct cannot be determined. Moreover, Gregory's argument is based on a rendition of facts most favorable to him, which is exactly the opposite of the requirements of this Court's cases. Because his interlocutory appeal was based on factual issues in the Court of Appeals, *Johnson v. Jones*, 515 U.S. 304 (1995), deprived

the Court of Appeals of jurisdiction *ab initio* and requires denial of Gregory's petition.

Gregory's repeated accusations that plaintiff has attempted to inject subjective analysis of intent into the Fourth Amendment issue of objective reasonableness misconstrues the allegations of Mr. Lee's complaint and the procedural posture of the summary judgment motions in the District Court. By selectively quoting factual submissions that had been made in the district court to support Mr. Lee's First Amendment retaliation claim and the state law-based FTCA claims, in his discussion of the Fourth Amendment issue, Gregory, whether deliberately or not, has confused the facts relevant to the intent-based causes of action with the Fourth Amendment false arrest violation and has attributed arguments to the petitioner which he never made. A review of the facts of the case, the complaint and the proceedings in district court will clarify the case. This review will demonstrate Gregory's factual submissions to be misleading and his legal argument to be without merit.

FACTS

Taken in the light most favorable to Julian Lee, these are the facts:

The son of a police officer, Julian Christopher Lee was thirty-five years old at the time of the events in this case. (C.A.E.R. 206). He had never been in trouble with the law, and had no criminal record. *Id.*

After high school Julian joined the Marines. *Id.* As a Marine, Julian was a weapons instructor at the Marine

Corps Base in Quantico, Virginia, where he taught military officers as well as FBI agents and DEA agents how to handle weapons. *Id.* After service in the First Gulf War, Julian lived for several years in San Diego, California, save for a brief stint while working as a commercial fisherman in Alaska. (C.A.E.R. 207). He had never been to Miami, Florida. *Id.*

Julian had an older brother named Robert Q. Lee. Robert had been in trouble with the law since he was a minor. Since at least 1993, Robert Lee has been wanted in Gloucester County, New Jersey for armed robbery and aggravated assault. (C.A.E.R. 84).

In February, 1997, the Gloucester County, New Jersey County Prosecutor requested the assistance of the United States Attorney's Office for New Jersey in locating Robert Q. Lee, who had been charged in a New Jersey state court with armed robbery and aggravated assault (App. 33-34). The Gloucester County prosecutor sent a letter to United States Attorney Jeremy Frey of the District of New Jersey. *Id.* The letter stated that Robert Q. Lee "has changed his name to Christopher Lee DOB 3/7/67." (App. 33). The state prosecutor requested that the United States Attorney charge Robert Q. Lee with unlawful flight to avoid prosecution under 18 U.S.C. § 1073, a federal offense. *Id.*

The day after Mr. Frey received this letter, William Grace, a special agent of the FBI, filed a sworn affidavit in support of a complaint alleging unlawful flight to avoid prosecution against Robert Q. Lee in the United States District Court for New Jersey. (App. 37-39). The complaint stated that the FBI had received information that Robert Q. Lee had "changed his name to Christopher Lee." (App. 38).

In August, 1998, a San Diego FBI agent, William Espino, was assigned a "lead" to interview Robert Q, Lee's brother, Julian Christopher Lee. (C.A.E.R 78). The lead described Julian as a male, d.o.b. 03/07/1967, 6'3" tall and weighing 270 pounds, with brown hair and brown eyes. (C.A.E.R. 79). Espino was unable to locate Julian C. Lee. *Id.*

In July, 1999, Jake FBI Agent Gregory was assigned a "lead" to interview Julian Lee to seek information as to the whereabouts of the fugitive Robert Q. Lee. *Id.* The "lead" noted that the Metro-Dade Police Department maintained an arrest warrant for a "Christopher Lee." *Id.*

The FBI file contained a wanted poster with two photographs of Robert Q. Lee. (C.A.E.R. 85). The poster set forth Robert Lee's known aliases, including "Christopher Lee." *Id.* The poster noted that Robert Lee's "other" social security numbers included 149-28-3215 (Julian Lee's actual social security number) and that his "other" dates of birth included March 7, 1967 (Julian Lee's actual date of birth). *Id.* Several years before his arrest, Julian Lee became aware that his estranged brother Robert was using his name and identifying data. (App. 28). He learned this because the FBI had reported to another of Julian's brothers and to a cousin that Robert was using the names and social security numbers of family members while he was a fugitive. *Id.* The outstanding state arrest warrant from Dade County, Florida for Christopher Lee (the known alias of Robert Lee) carried a description of physical characteristics that were grossly dissimilar to those of Julian Lee (a difference of two inches in height and 70 pounds in weight), but matched more closely the physical description of the fugitive Robert Q. Lee. The Florida warrant described a suspect 6'1" and 200 pounds. (C.A.E.R. 80, 83). The last description of Robert Q. Lee

was from 1994 and put his height at 6'0" and his weight at 180 pounds. (C.A.E.R. 128).

In early 2000, in an attempt to locate Julian Lee, Gregory interviewed J.B. Kleiman. Mr. Kleiman told Gregory that Julian had lived with him in his house for about six months and that Julian had been "very kind" to Mr. Kleiman's grandmother, who was dying at the time. (C.A.E.R. 170-171). Mr. Kleiman told Gregory that Julian Lee was over six feet tall and weighed more than 200 pounds (*i.e.*, he did not match the physical description on the Florida warrant). (C.A.E.R. 172). Gregory showed Mr. Kleiman pictures of Robert Q. Lee; Kleiman said that those were not pictures of plaintiff. *Id.*

Gregory knew before Julian's arrest that the federal warrant was for Robert Q. Lee a/k/a Christopher Lee; that the Gloucester County Prosecutor had reported that Robert Q. Lee had changed his name to Christopher Lee using Julian's date of birth; that the FBI's own wanted poster listed Robert Q. Lee with the alias Christopher and stated that Robert Q. Lee was living under the name Christopher Lee in 1997. Gregory's file contained a 1994 mug shot of Robert Q. Lee reflecting a height of 6 feet tall and a weight of 180 pounds. (C.A.E.R. 50-51, 117-120, 124-128).

On April 21, 2000, Gregory went to Julian's home in Encinitas, California and left a business card with one of Julian's friends, requesting that Julian call him. (C.A.E.R. 79, 310). That same day, Julian telephoned Gregory and identified himself as Julian Christopher Lee. (App. 29). Julian asked if there was any law that required him to speak with the FBI. *Id.* Gregory said that there was not. *Id.* Julian told Gregory to stop harassing him and his friends. (App. 30). Julian explained that he had not seen